Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

v.

HANOVER INSURANCE COMPANY, ET AL

Respondent.

Petition For Writ Of Certiorari
To The Massachusetts Supreme Court

PETITION FOR WRIT OF CERTIORARI

FRED DAVIS
353 BRYANT STREET
MALDEN, MASSACHUSETTS 02148
(617) 322-8223

25 pp

ISSUES PRESENTED

I.

Should this court grant certiorari to resolve the issues of breach of contract and other related issues which resulted when petitioner was entraped to sign a release to be paid the sum of $20,000.00 (twenty thousand) dollars for permanent partial disability injuries caused by the respondent's insured. Respondent is holding the release signed by the petitioner and never paid the petitioner.

II.

Massachusetts Law of Crimes Against the Elderly and Disabled involving larceny of $250. (two hundred & fifty) dollars is punishable by both fines and jail sentences

III.

Amendment XIV All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state

deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

Was the granting of a Summary Judgment to the respondents appropriate based on the facts and evidence presented to the lower court.

V.

The public interest is involved.

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Petitioner, Fred Davis, respectfully prays that a writ of certiorari issue to review decision of the Massachusetts Supreme Court and grant the order that the petitioner be paid the sum of $20,000.00 (twenty thousand) dollars plus interest, legal fees, court cost, enforcement of the Massachusetts Law Crimes Against the Elderly and Disabled and triple damages, or as an alternative remand action to the Court for trial by jury and any other relief the Court deems appropriate.

OPINIONS BELOW

The lower Court's ruling was for the respondent and is attached Appendix D.

The Massachusetts Supreme Court's decision for Further Appellate Review was denied and is attached Appendix E.

JURISDICTION

July 24, 1996, the Massachusetts Supreme Court denied Further Appellate Review. This petition is filed within the 90 days of the Massachusetts Supreme Court's decision denying Further Appellate Review.

This Court's jurisdiction is invoked under 28 United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteen Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property without due process of law: nor deny to any person within its jurisdiction the equal protection of

of the laws.

STATEMENT OF THE CASE

The petitioner Fred Davis, is a senior citizen.

February 11, 1987, Anthony Lauria (Hanover Insurance Company is Lauria's automobile Insurance carrier) negligently operated a motor vehicle causing a motor vehicle accident.

As a result of this accident,the petitioner received severe bodily injuries resulting in partial permanent disability.

Since the accident, up to and including the present petitioner has been under the care of a physician.

In addition, petitioner has lost approximately $50,000.00 (fifty thousand) dollars in wages and excessive damage to his motor vehicle.

Petitioner engaged the legal service of Robert T. Abrams paying him a fee of $1,000.00 (one thousand) dollars.

August 29, 1991, the petitioner received

from attorney Abrams a release in the amount of $20,000.00 along with a note in which the petitioner should sign and return to him, and is attached Appendix A.

Petitioner was informed by attorney Abrams that he received a letter dated September 12, 1991, from Mark F. Mahnken of the law firm of Driscoll, Gillespie & Stanton located at 200 Broadway, Lynnfield,Massachusetts indicating that he wanted the name of Hanover Insurance on the release, and is attached Appendix B.

September 20, 1991, petitioner complied with the request and Hanover Insurance Company name appeared on the release, and is attached Appendix C.

After petitioner signed the release, fraud, unfair, deceptive business practices and Crimes against the Elderly and Disabled was used and the respondents refused to pay the petitioner.

March 10, 1993, petitioner files his Complaint for breach of contract and jury claim in the Norfolk Superior Court in Dedham, Massachusetts.

September 24, 1993, respondents filed a Motion For Summary Judgment.

Petitioner filed a timely objection to the Summary Judgment.

Respondent' Summary Judgment is allowed.

The petitioner appeals the lower Court's decision. Now the issue is before the Court.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO PROTECT THE PETITIONER FROM FRAUD, UNFAIR AND DECEPTIVE BUSINESS PRACTICES

September 20, 1991, Petitioner signed a release in which payment was to be made in 30 days, and is attached Appendix C.

Respondents accepted the petitioner's signed release and refused to pay him. Respondents since September 20, 1991, up to and including to this date are holding the petitioner's signed release in their possession. United States v. Windstar 64 United States Law Weekly page 4739 "a contract is a contract". Massachusetts General Laws c176D § 3 (9)(f) inserted by St. 1972, c 543, § 1, provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonable clear". Massachusetts General Laws c. 93A. § (1) covers such insurance practices in its prohib-

ition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". Dodd v Commercial Union Insurance Company 373 Mass. at 78, "and provides for recovery of up to three but not less than two times actual damages...."

II. MASSACHUSETTS LAW OF CRIMES AGAINST THE ELDERLY AND DISABLED

The Court failed to take any action in enforcing Massachusetts Law of Crimes Against the Elderly and Disabled although larceny was committed by the respondents upon the petitiioner who is elderly and partial disabled.

III. THE UNITED STATES CONSTITUTION FOURTEEN AMENDMENT MUST BE PROTECTED

The court did not protected the Fourteen Amendment when it denied the petitioner equal protection of the law. Petitioner had the Constitution Right to have the Law of Crimes against the Elderly and Disable enforced.

IV. SUMMARY JUDGMENT WAS NOT APPROPRIATE

There are genuine and material issues and evidence to require a jury to resolve the par-

ties versions of the truth at time of trial.

The evidence must be examined in the light most favorable to the plaintiff Leclair v. SILBERLINE Mfg. 379 Mass. 21 at 23 (1979) In reviewing a motion for Summary Judgment a court must consider the pleadings related documents, evidence and all reasonable inferences in a manner most favorable to the non-moving party. Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 S. Ct 1598, 26 L. Ed 2d 142 (1970), Smith v. Hudson 600 F. 2d 60 (6th Cir. 1979). Haines V. Kerner 404 U.S. 519 the court should be lenient when Pro Se.

V. THE PUBLIC INTEREST IS INVOLVED

The public interest is involved as this case will be used as a precedent. All contracts/releases with special emphasis on releases signed by the public, whereby they would not get paid for injuries, etc. The bottom line is that the complete country would be a disaster. All contracts/releases would not be enforceable in the Courts.

CONCLUSION

WHEREFORE, Petitioner Fred Davis respectfully prays that this Honorable Court grant

this petition and issue a writ of certiorari to review the facts as set forth in the foregoing and grant the order that the petitioner be paid the sum of $20,000.00 (twenty thousand) dollars, plus interest, legal fees, court costs, enforcement of the Massachusetts Law Crimes Against the the Elderly and Disabled and triple damages, or as an alternative remand action to the Court for trial by jury and any other relief the Court deems appropriate.

Respectfully submitted,

Fred Davis
353 Bryant Street
Malden, Massachusetts 02148
(617) 322-8223

From the desk of -
ROBERT T. ABRAMS

August 29, 1991

Dear Fred:

I am enclosing a release which you should sign and date and return to me at 50 Union Street #1. Newton, Ma 02159-2223. I will then exchange the release for a check in the sum of $20,000.00 from Hanover Insurance Co.

My wife and I stopped in New York City on our way home from vacation to see our son, David, sworn in as a member of the Federal Court Bar.

My best wished to you and your family.

S/ Bob Abrams

App. 2

DRISCOLL,GILLESPIE & STANTON

P.O. box 850
Lynnfield Woods Office Park
200 Broadway
U.S.1, Route 1, South
Lynnfield, Ma 01940-2314
(617) 598-2200

September 12, 1991

Robert R. Abrams
50 Union Street
Newton, Ma 02159

RE: Fred Davis
VS: Anthony Lauria
No: T-41026

Dear Attorney Abrams:

I assume that by now you are back from your vacation and are in a position to resolve the above captioned matter.

Kindly provide a Release in the amount of $20,000.00 and I would appreciate your having Hanover Insurance Company named on the Release. also.

Your assistance is most appreciated.

Thank you.

Very truly yours,
DRISCOLL, GILLESPIE & STANTON

S/ Mark F. Mahnken
MFM/pm
CC: Hanover Insurance Co.
file 38-054519-30

App. 3

RELEASE

September 20, 1991

In consideration of Twenty thousand ($20,000.00) dollars to me paid by Anthony Lauria and Hanover Insurance Company the receipt whereof is hereby acknowledged I hereby remise, release and forever discharge the said Anthony Lauria and Hanover Insurance Company from all debts, demands, actions, causes of action, suits, dues, sum and sums of money, accounts reckonings, bonds, specialties, covenants, contracts,controversies, agreements, promises, doings, omissions, variances, damages, extents, executions and liabilities and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the said Anthony Lauria and Hanover Insurance Company or their heirs, executors, administrators, successor or assigns I now have or ever had from the begining of the world to this date and more especially on account of personal injuries sustained by me on February 11, 1987 and the lawsuit now pending in the Boston Municipal Court, docket number T-41026. The settlement draft is to be made payable to Fred Davis and his attorney, Robert T. Abrams. The draft is to be paid within 30 days.

Executed as a sealed instrument this day and year above written.

S/Fred Davis
Signed in presence of
S/Robert T. Abrams

Lawyers Stationery Co., Boston Form 23

APP. 4

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

95-1818

FRED DAVIS

vs.

HANOVER, INSURANCE COMPANY

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The judgment is affirmed substantially for the reasons set forth in the brief of the defendant.

So ordered.

By the Court (Dreben, Gillerman & Laurence, JJ)

S/Nancy Turck Foley
Clerk

Entered: June 14, 1996

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Fred Davis
353 Bryant Street
Malden, Ma 02148

RE: Docket No. FAR-08597

Fred Davis
vs.
Hanover Insurance Company

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 24, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: July 24, 1996

To: Fred Davis
George R. Suslak, Esquire

Supreme Court, U.S.
FILED
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CLERK

No. 96-640

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

vs.

HANOVER INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE R. SUSLAK
Counsel of Record for Respondent
STANTON & LANG
P.O. Box 1080
200 Broadway
Lynnfield, MA 01940
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OR CALL COLLECT (402) 342-2831

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RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW

The Petitioner, in his Petition for Writ of Certiorari, has purportedly presented five issues for this Court to review. The Respondent maintains that none of the questions presented merits this Court's review for the following reasons:

1. The Petitioner's first issue seeks a review by this Court to "resolve the issues of breach of contract and other related issues" (Pet. at i)[1]. The issue of whether an alleged contract between two private parties was breached is not an appropriate issue for review by the Supreme Court of the United States.

2. The second issue presented by the Petitioner alleges that the Respondent's conduct constitutes a crime against an elderly and/or disabled person. The Petitioner has failed to identify what specific statute is to be reviewed by this Court and by what authority this Court could review this matter. Finally, this issue was never presented to the Supreme Judicial Court of Massachusetts in the Petitioner's Application for Leave to Obtain Further Appellate Review, therefore, it is not appropriate for review by this Court. (App. at 1-10).[2]

3. The Petitioner's third question for review cites the Fourteenth Amendment to the Constitution of the United States. Although this issue would appear to present a federal question, the Fourteenth Amendment applies only to state actions, and does not apply

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[1] Respondent hereinafter will make reference to the Petition for Writ of Certiorari as "Pet."

[2] Respondent hereinafter will make reference to the Respondent's Appendix as "App."

RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW – Continued

to matters between two private parties. Furthermore, this issue was never previously addressed on its merits by the State courts.

4. The fourth question presented by the Petitioner is vague, but appears to seek this Court's review of the propriety of the trial court's allowance of the Respondent's motion for summary judgment. This question presents no factual or legal basis by which this Court could or should exercise jurisdiction.

5. The fifth question presented by the Petitioner fails to provide any *question* for this Court to review, rather it simply states that "the public interest is involved". (Pet. at ii). Although questions presented for review are to be "expressed concisely" and "without unnecessary detail" (Supreme Court Rule 14 (1) (a)), the Petitioner completely fails to provide any connection between the alleged question and the circumstances of this case, as required by Rule 14 (1) (a).

LIST OF INTERESTED PARTIES

The Petitioner is Fred Davis. The Petitioner's caption lists the Respondent as "Hanover Insurance Company, *et al.*" (emphasis added). There is no other Respondent to this matter other than Hanover Insurance Company.

Pursuant to Supreme Court Rule 29.6, the Respondent supplies the following information concerning the corporate structure of the Respondent:

1. The Hanover Insurance Company is a New Hampshire Corporation, with a principal place of business at 100 North Parkway, Worcester, MA, which is wholly owned by Allmerica Property and Casualty Companies, Inc. which is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

2. Allmerica Property and Casualty Companies, Inc. is publicly traded on the New York Stock Exchange.

3. Allmerica Financial Corporation is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

4. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange and it is the indirect parent company of Allmerica Property and Casualty Companies, Inc. and Citizens Corporation, which is a Delaware Holding Company with a principal place of business at 440 Lincoln Street, Worcester, MA.

5. Citizens Corporation is publicly traded on the New York Stock Exchange.

6. Allmerica Financial Corporation, through its wholly owned subsidiary First Allmerica Financial Life

LIST OF INTERESTED PARTIES – Continued

Insurance Company ("First Allmerica"), a Massachusetts insurer and SMA Financial Corp., a Massachusetts holding company which is a wholly owned subsidiary of First Allmerica, owns 59.47 percent of the Common Stock of Allmerica Property and Casualty Companies, Inc.

7. The Hanover Insurance Company owns 82.5 percent of the Common Stock of Citizens Corporation.

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STATEMENT OF JURISDICTION

The Petitioner claims that this Court's jurisdiction is "invoked under 28 United States Code." (Pet. at 2). This assertion of jurisdiction is overly vague and does not comply with Rule 14(1)(e) of the Supreme Court Rules. It is assumed that the Petitioner is claiming that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a). As will be discussed in more detail below, § 1257(a), on its face, does not apply to any of the issues presented to this Court, with the possible exception of the third question, which is based upon the Fourteenth Amendment to the Constitution. Even assuming that the Petitioner has alleged a federal question over which this Court could possibly exert jurisdiction under § 1257(a), for reasons set forth below, this Court should refuse to accept jurisdiction of the issue allegedly involving the Fourteenth Amendment.

STATEMENT OF THE CASE

This action arises out of a 1987 motor vehicle accident between the Petitioner, Fred Davis, and Anthony Lauria, who was insured under an automobile insurance policy by the Respondent, Hanover Insurance Company. (Pet. at 3). The Petitioner was initially represented in his claim by the law firm of Ravech, Aronson & Shuman, PC (App. at 41). On April 26, 1991, with leave of Court, the law firm of Ravech, Aronson & Shuman, P.C. withdrew from the case and served the Respondent's attorney with a Seven Thousand Five Hundred Dollar ($7,500.00) lien. (App. at 22). In September of 1991, counsel for the

Respondent and the Petitioner agreed to settle the Petitioner's lawsuit against Anthony Lauria in exchange for Twenty Thousand Dollars ($20,000.00). (App. at 23). On September 20, 1991, subsequent legal counsel for the Petitioner sent to counsel for the Respondent a release executed by the Petitioner. The release sought a settlement draft made payable to the Petitioner and his then-current attorney. (App. at 23). On September 24, 1991, the Respondent's attorney wrote to the Petitioner's attorney and informed him that Massachusetts General Laws, Chapter 221, Section 50 obligated the Respondent to honor the prior attorney's lien, therefore, the Petitioner's first attorney would be listed as a payee on the settlement draft. (App. at 24). The Petitioner has, since that time, refused to accept the settlement draft.

On March 10, 1993, the Petitioner, now acting Pro Se, filed suit against the Respondent alleging: that Hanover Insurance Company breached its settlement agreement; that it violated Massachusetts General Laws Chapter 93A, the Consumer Protection statute; and that it attempted to cheat the Petitioner out of monies due him. (App. at 25-27). The complaint did not contain any allegation that the Respondent committed the crime of larceny upon an elderly or disabled person, nor did it contain any claims of violations of rights granted under the Constitution of the United States.

On August 25, 1993, the Respondent moved for summary judgment on the grounds that M.G.L. Chapter 221, Section 50 required the insurance company to honor the attorney's lien, therefore, no breach of contract existed, nor was the Respondent guilty of cheating the Petitioner out of money. (App. at 28-39). The Petitioner, in opposing

the motion for summary judgment, failed to raise any issues concerning federal questions. (App. at 40-70). On January 14, 1994, the Norfolk County Superior Court allowed the motion for summary judgment. (App. at 71).

Following the subsequent voluntary dismissal of the Respondent's counterclaim on September 12, 1995 (App. at 75), the Petitioner appealed the order granting summary judgment to the Massachusetts Court of Appeals. The Petitioner failed to raise any federal question in his Brief to the Massachusetts Court of Appeals. (App. at 11-21). On June 14, 1996, the Court of Appeals affirmed the Norfolk County Superior Court judgment. (App. at 77).

On or about July 1, 1996, the Petitioner filed with the Massachusetts Supreme Judicial Court an Application for Leave to Obtain Further Appellate Review. (App. at 1-10). In this Application, the Petitioner, for the first time, vaguely made reference to a violation of his Constitutional rights when he made the wholly unsupported allegation that his "Constitutional Rights both State and Federal were violated when he did not receive equal protection of the law." (App. at 6). On July 24, 1996, the Supreme Judicial Court denied the Petitioner's Application for Leave to Obtain Further Appellate Review, (App. at 78), without addressing the alleged Constitutional issues of the Petitioner.

On or about October 18, 1996, the Petitioner filed his Petition for Writ of Certiorari to this Court.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The Petitioner alleges that the Respondent used "Crimes Against the Elderly and Disabled" and that the Respondent "refused to pay" the Petitioner. (Pet. at 4). The Massachusetts criminal statute to which the Petitioner vaguely refers is, apparently, Massachusetts General Laws, Chapter 266, Section 30. The allegation of criminal conduct by the Respondent was not presented to the Massachusetts State Courts. In fact, the statute creating the crime of larceny from an elderly or disabled person did not become law until December 18, 1995. (App. at 79-80). Furthermore, the Respondent denies that it has refused to pay the Petitioner. In fact, the Respondent has actually sent the Petitioner a settlement draft on several occasions.

ARGUMENT FOR DENIAL OF WRIT

I. THE COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ISSUES

In accordance with 28 U.S.C. § 1257(a), this Court may only review final judgments or decrees rendered by the highest court of a state if the validity of a treaty or statute of the United States is in question, where a state statute is alleged to be repugnant to the Constitution, treaties or laws of the United States or where there is a claim of any title, right, privilege or immunity under the Constitution, treaties or statutes in the United States.

The first issue presented to this Court by the Petitioner requests that this Court review the issues surrounding an alleged breach of a contract to settle a bodily injury lawsuit. The alleged agreement was between the Petitioner, a private citizen, and the Respondent, an insurance company. There is no question before this Court concerning any treaty, statute or provision of the Constitution of the United States, rather this is merely a claim of a breach of a private contract.

In the absence of a substantial federal question before the Court, there is no power in the Supreme Court to review the judgment of a state court. *Reich v. Freeport*, 388 F. Supp. 953 (ND Ill., 1974).

Similarly, the second issue presented to the Court alleges that the Respondent's conduct somehow constituted a criminal act in violation of "Massachusetts Law of Crimes Against the Elderly and Disabled." (Pet. at i). Although no specific statutory reference is made, the Petitioner indicates that the law in question is a *Massachusetts* law, not a statute of the United States. In the absence of the allegation that this unnamed Massachusetts law is repugnant to the Constitution, treaties or laws of the United States, then the Court is not empowered to exercise jurisdiction on this issue, in accordance with 28 U.S.C. § 1257(a).

It also must be noted that the Petitioner first raised the issue of the violation of a Massachusetts criminal statute in his Petition to this Court. If this issue was not presented to the state court, then the Supreme Court has no power to consider the issue. *Street v. New York*, 394 U.S. 576, 581 (1969).

The Petitioner's third issue attempts to raise a federal question under the Fourteenth Amendment and will be addressed below.

The fourth issue presented by the Petitioner requests that this Court revisit the issue of whether the Massachusetts trial court correctly granted the Respondent summary judgment. The issue in dispute in the motion for summary judgment was whether the Respondent insurance company acted properly by respecting the statutory lien served on it by the Petitioner's first attorney. Again, there is absolutely no federal question raised in this issue and without such a question, the Supreme Court is without authority to review the state court's judgment. *Reich, supra.*

The Petitioner's fifth and final issue does not raise any question at all. This claim merely asserts that the "public interest is involved". (Pet. at ii). The Petitioner has failed to provide the Respondent with any details on the issue that he seeks to be reviewed. Rule 14(1)(a) of the Supreme Court Rules is intended to provide the Respondent with notice of the grounds on which the Petitioner is seeking certiorari, so that the Respondent can direct his opposition to the appropriate issue. *Yee v. Escondido,* 503 U.S. 519, at 535-536 (1992).

The Petitioner clearly has not complied with the requirements of Rule 14, which is to express concisely the question presented for review and how the circumstances of this case would apply. The Petitioner merely claims that the country could face a disaster if the Court did not review this matter. There simply is no jurisdiction for Court to review this matter.

II. THE PETITIONER'S FOURTEENTH AMENDMENT ARGUMENT FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION, WAS NOT PRESENTED TO THE MASSACHUSETTS TRIAL COURT OR COURT OF APPEALS AND WAS NOT DECIDED ON THE MERITS BY THE MASSACHUSETTS SUPREME JUDICIAL COURT

As noted above, this action arises out of the apparent settlement of a bodily injury lawsuit resulting from a 1987 motor vehicle accident. The Respondent was accused of breaching its alleged settlement agreement with the Petitioner because the Respondent insisted that the settlement draft contain the name of the Petitioner's first attorney, who had served the Respondent with an attorney's lien.

In opposing the Respondent's motion for summary judgment in the trial court, the Petitioner did not claim any violation of his rights under the Fourteenth Amendment. (App. at 40-70). On January 14, 1994, summary judgment was granted. (App. at 71).

The Petitioner subsequently appealed the trial court's judgment to the Massachusetts Court of Appeals. Again, the Petitioner failed to make any reference in his appeal to an alleged violation of his Fourteenth Amendment rights. (App. at 11-21). On June 14, 1996, the Court of Appeals affirmed the Superior Court judgment without ever having considered any alleged Constitutional violations. (App. at 77).

On July 1, 1996, the Petitioner filed his Application for Leave to Obtain Further Appellate Review with the

Massachusetts Supreme Judicial Court. In that application, the Petitioner made his first and only mention of an alleged violation of his Constitutional Rights. The extent of the Petitioner's claim of such a violation of the Constitution was the following sentence: "Davis' Constitutional Rights both State and Federal were violated when he did not receive equal protection of the law". (App. at 6).

The Petitioner did not provide any factual or legal basis for his Constitutional claim. Not a single case was cited in support of this claim, nor did the Petitioner recite in what manner he was deprived of equal protection. On July 24, 1996, the Supreme Judicial Court denied the Petitioner's application. (App. at 78).

In order for this Court to have jurisdiction over the Petitioner's Fourteenth Amendment claim, this issue must have first been presented to and decided by the Supreme Judicial Court of Massachusetts. This case is similar to the case of *Yee v. Escondido, supra,* which involved a claimant who failed to raise a federal question in their original complaint or in the appeal to the State Court of Appeal. The federal question, which was based upon a due process claim, did not arise until the claimant petitioned the California Supreme Court for further review. As is the case with the Massachusetts Supreme Judicial Court, the California Supreme Court has the discretion whether to accept the claimant's petition. The California Supreme Court denied the discretionary review. *Id.* at 533.

The claimant in *Yee* subsequently petitioned this Court for a Writ of Certiorari, citing a deprivation of their

right to due process. This Court ruled that a state's highest court's denial of a discretionary review is not a decision based upon the merits of the claim. *Id.* Given the fact that the claimant had never previously raised the federal question, no state court ever addressed the Constitutional claim.

The Supreme Court, pursuant to 28 U.S.C. § 1257(a), only has jurisdiction over those claims based upon a federal question decided by the state's highest court. If the federal question was not presented to the state courts in such a manner that the state courts necessarily determined the federal question, then the Supreme Court would have no power to consider the issue. *Street, supra,* at 581-582. A denial of a discretionary appeal by a state's highest court is, therefore, not considered to be a decision on the merits of the Constitutional question. *Yee, supra* at 533.

With rare exceptions, this Court refuses to consider a petitioner's claim of a federal question that was not raised or addressed below. *Id.* Clearly, the factual basis for the Petitioner's alleged Constitutional claim does not support this Court making an exception to its customary practice. There can be no more obvious example of a Petitioner raising a frivolous and insubstantial federal question for the sole purpose of attempting to create jurisdiction in the Supreme Court. This Court should not entertain any frivolous petition where a federal question is raised merely to obtain jurisdiction of this Court. *Erie R. Co. v. Solomon,* 237 U.S. 427, 431 (1915).

III. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO STATE ACTION UPON WHICH TO BASE A FOURTEENTH AMENDMENT CLAIM

If this Court determines that it could properly exercise jurisdiction over the Petitioner's Fourteenth Amendment claim, then the Respondent would respectfully submit that this Court should exercise its discretion and reject the Petition due to the merits of the alleged claim.

As is commonly known, the protections of the Fourteenth Amendment apply strictly to state action and do not apply to purely private actions. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). This case involves a private citizen, Fred Davis, and an insurance company, Hanover Insurance Company. There is absolutely no evidence, or even a suggestion, that would establish any state action in the case before this Court. The Petitioner has merely alleged an equal protection violation, but he has not provided the slightest hint of the necessary state action to invoke the protection of the Fourteenth Amendment.

In order to obtain jurisdiction, the Petitioner must present a federal question with merit. Where a federal question lacks all color of merit and has no substance or foundation, the mere fact that a federal question has been raised does not provide sufficient grounds for this Court to exercise jurisdiction. *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336, 354 (1902). In the absence of a legitimate Fourteenth Amendment claim, this Court should deny the petition, as certiorari is granted only in those cases which are important to the public at large and

not just the parties in question. *National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U.S. 498, 502 (1951).

CONCLUSION

The Petition for Writ of certiorari should be denied.

Respectfully submitted,

GEORGE R. SUSLAK, ESQUIRE
Counsel of Record for Respondent
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940
(617) 595-1440
BBO#541921

Dated: November 19, 1996

APPENDIX

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. SJC NO.
APPEALS COURT NO. 95-P-1818

FRED DAVIS
PLAINTIFF-APPELLANT

VS.

HANOVER INSURANCE COMPANY, ET AL
DEFENDANTS-APPELLEES

APPELLANT, FRED DAVIS, APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

FRED DAVIS
PLAINTIFF-APPELLANT
353 BRYANT STREET
MALDEN, MA 02148
(617) 322-8223

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss

SJC NO.
APPEALS COURT NO.
95-P-1818

FRED DAVIS,
PLAINTIFF-APPELLANT

VS.

HANOVER INSURANCE
COMPANY, ET AL
DEFENDANT-APPELLEES

APPELLANT, FRED DAVIS' APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, the appellant, Fred Davis requests that the Massachusetts Supreme Judicial Court grant further appellate review for reasons affecting the public interests of justice and Federal and State Constitutional Rights.

II. PRIOR PROCEEDINGS

The Plaintiff - Appellant, Fred Davis, is a senior citizen who resides at 353 Bryant Street Malden, Massachusetts.

February 11, 1987, Anthony Lauria negligently operated a motor vehicle causing a motor vehicle accident.

As a result of this accident, Davis received severe bodily injuries resulting in partial permanent disability.

Since the accident, up to and including the present Davis has been under the care of a physician.

In addition, Davis has lost approximately $50,000.00 in wages and excessive damage to his motor vehicle.

September 20, 1991, Davis entered into a contract with Hanover Insurance Company a copy of this contract is reproduced below:

RELEASE

September 20, 1991. In consideration of Twenty thousand ($20,000.00) dollars to me paid by Anthony Lauria and Hanover Insurance Company the receipt whereof is hereby acknowledged I hereby remise, release and forever discharge the said Anthony Lauria and Hanover Insurance Company from all debts, demands, actions, causes of action, suits, dues, sum and sums of money, accounts reckonings, bonds, specialties, covenants, contracts, controversies, agreements, promises, doings, omissions, variances, damages, extents, executions and liabilities and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the said Anthony Lauria and Hanover Insurance Company or their heirs, executors, administrators, successors or assigns I now have or ever had from the beginning of the world to this date and more especially on account of personal injuries sustained by me on February 11, 1987 and the lawsuit now pending in the Boston Municipal Court, docket number T-41026.

The settlement draft is to be made payable to Fred Davis and his attorney, Robert T. Abrams. The draft is to be paid within 30 days.

Executed as a sealed instrument this day and year above written.

/s/ Fred Davis

Signed in presence of
/s/ Robert T. Abrams
Lawyers Stationery Co., Boston Form 23

After Davis signed the release and it was in the possession of Hanover Insurance Company, now the picture changes and Hanover Insurance Company, now the picture changes and Hanover Insurance Company refused to fulfill their obligation and pay Davis in compliance with the terms and conditions of the contract.

Hanover Insurance Company has accepted the signed contract and it has been in their possession since September 20, 1991 including up to this date.

March 10, 1993, Davis files his Complaint and Jury Claim in the Norfolk Superior Court in Dedham, Massachusetts.

September 24, 993 [sic] Defendants filed a Motion for Summary Judgment.

Davis filed a timely objection to the Defendants' Motion for Summary Judgment.

There was oral argument on the Defendants' Motion For Summary Judgment.

Later, Judge Connolly allowed the defendants' Motion For Summary Judgment without issuing a Memorandum Of Law and Order.

January 21, 1994, Davis files Notice of Appeal.

Norfolk Superior Court does not assemble the record and forward it to the Appeals Court.

September 22, 1994, Davis files Second Notice of Appeal. Davis informed by the clerk that Judge Connolly does not want this case to go to the Appeals Court.

Davis contacts Judge Chernoff and is informed that "it's Judge Connolly's case and he can do nothing."

August 10, 1994, Davis filed Third Motion For Immediate Assembly of the Record.

There is no response from the Norfolk Superior Court and the record is not forwarded to the Appeals Court.

September 22, 1994, Davis files Fourth Notice For Immediate Assembly of the Record and Send copy to Massachusetts Appeals Court.

Davis is again informed that Judge Connolly does not want this case to go to the Appeals Court.

July 18, 1995, Davis filed Fifth Notice For Immediate Assemble of the Record. There is no action taken by the Norfolk Superior Court and the case is not forwarded to the Appeals Court.

August 5, 1995, Davis filed Sixth Notice For Assemble of the Record.

Finally, the case is assembled and forwarded to the Appeals Court.

Appeals Court Denied the Appellant's Appeal.

Appellant files Motion for Clarification of Appeals Courts Decision and citations Appeals Court relied upon in its decision. The Appeals Court denies Appellant's Motion.

III. STATEMENT OF FURTHER APPELLATE REVIEW

Massachusetts General Laws c 176D § 3 (9) f inserted by St. 1972, c 543 § 1, provides that it is an unfair settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear", Massachusetts General Laws c 93A, § 2 (a) (inserted by St. 1967 c 813 § (1). covers such insurance practices in its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". *Dodd v. Commercial Union Insurance Company* 373 Mass at 78, and provides for recovery of up to three but not less than two times actual damages . . . "

Hanover Insurance Company knowingly and wilfully breachd [sic] the contract with one purpose and one purpose only and that is to fraud, use unfair and deceptive business practices to swindle and cheat Davis, a senior citizen out of $20,000.00.

Davis' Constitutional Rights both State and Federal were violated when he did not receive equal protection of the law.

In reviewing a Motion For Summary Judgment a court must consider the pleadings related documents, evidence and all reasonable inferences in a manner most

favorable to the non-moving party. *Adickes v. H. Kress & Co.* 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed 142 (1970) *Smith v. Hudson* 600 F. 2d 60 (6th Cir 1979).

Therefore, since there are sufficient facts and evidence in dispute the court erred in its decision.

Hanover Insurance Company misrepresented the facts with the actual intent to act in bad faith, mislead, deceive and fraud the court. Hanover informed the court that Davis was paid, however, no evidence was submitted to the Court of a cancelled check bearing Davis' signature that he was paid $20,000.00. The fact is Davis did not receive one penny from Hanover Insurance Company in settlement of the release that he signed on September 20, 1991. (Copy of release appears on page 2). *Groh v. Viglet* 34 Ohio Law R 132, "an act done with actual intent to mislead or deceive another is an act in bad faith". *Hilgenber v. Northrup* 33 N.E. 786, 787, 134 In [sic] 92. "Bad faith and fraud are synonymous".

The public must be protected from unscrupulous Insurance Companies such as Hanover Insurance Company who uses fraud, unfair deceptive business practices.

Hanover Insurance Company business practices is that get an individual to sign a release, hold the signed release, don't pay the individual, when case goes into court Hanover Insurance Company lies to the Court, telling the court the claim was paid, however, no evidence of a cancelled check bearing the individual's signature proving that the individual was paid.

There is a serious miscarriage of justice when the court believes Hanover Insurance Company.

Since Davis is a victim of fraud, unfair and deceptive business practices in the hands of Hanover Insurance Company, there are strong possibilities that there have been other victims or there will be other persons victimized by Hanover Insurance Company.

Therefore, the issue becomes if Davis is a victim of fraud, unfair and deceptive business practices and swindled out of monies by Hanover Insurance Company, the public interest is also in jeopardy and must be protected from these acts by Hanover Insurance Company.

IV. CONCLUSION

For the foregoing reasons, the appellant Fred Davis, requests that his Application For Leave To Obtain Further Appellate Review be allowed.

RESPECTFULLY SUBMITTED BY

/S/ Fred Davis
FRED DAVIS,
PLAINTIFF-APPELLANT
353 BRYANT STREET
MALDEN, MA 02148

CERTIFICATE OF SERVICE

I, Fred Davis hereby certify that a copy of the foregoing document was hand delivered to the Appeals Court.

DATE: 7-1-96

/s/ Fred Davis

CERTIFICATE OF SERVICE

I, Fred Davis, hereby certify that a copy of the foregoing document was mailed to: George R. Suslak, Esquire Stanton & Lang 200 Broadway, P.O. Box 1080 Lynnfield, Ma 01940 postage prepaid.

DATE: 7-1-96

/s/ Fred Davis

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

pending in the Superior Court for the County of Norfolk

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Nancy Turck Foley, Clerk.

Date June 14, 1996

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

The judgment is affirmed substantially for the reasons set forth in the brief of the defendant.

So ordered.

By the Court
(Dreben, Gillerman
& Laurence, JJ.).

/s/ Nancy Turck Foley
Clerk

Entered: June 14, 1996.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 96-1650

FRED DAVIS,
PLAINTIFF - APPELLANT

VS.

HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, CHAIRMAN OF THE BOARD OF HANOVER INSURANCE COMPANY,
DEFENDANTS - APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFF - APPELLANT
AND
APPENDIX OF PLAINTIFF - APPELLANT

I. ISSUES PRESENTED ON APPEAL

The appeal by the Plaintiff – Appellant, Fred Davis, presents the following issues to be decided by this honorable court.

1. The lower court erred in law in granting the Defendants' Motion For Summary Judgment given the law, facts and evidence of the case.

2. The lower court erred in not protecting the Plaintiff-Appellant's State & Federal Constitutional Rights.

3. The lower court erred in basing its decision on the United States Constitution Thirteenth Amendment.

4. The lower court erred in basing its decision on the defendants – appellees' wilful misrepresentation of the facts.

II. STATEMENT OF THE CASE

The Plaintiff – Appellant, Fred Davis, is a senior citizen (hereinafter referred to as Davis) resides at 353 Bryant Street Malden, Massachusetts.

February 11, 1987, Anthony Lauria negligently operated a motor vehicle causing a motor vehicle accident.

As a result of this accident, Davis received severe bodily injuries resulting in partial permanent disability.

Since the accident, up to and including the present Davis has been under the care of a physician.

In addition, Davis has lost approximately $50,000.00 in wages and excessive damage to his motor vehicle.

September 11, 1991, Davis' attorney Abrams received a letter from Mark F. Mahnken of the law firm of Driscoll, Gillespie & Stanton located at 200 Broadway, Lynnfield, Massachusetts, outlining the appellees [sic] impute in the release which stated in pertinent part:

> "Kindly provide a Release in the amount of $20,000.00 and I would appreciate your having Hanover Insurance Company named on the Release, also"

There was no additional terms or conditions by the appellees other than stated above.

Davis complied with this request and Hanover Insurance Company was named on the Release and signed by Davis.

September 20, 1991, Davis signed the release in compliance with all appellee's [sic] conditions as stated above. This release was witnessed by Robert T. Abrams (app. page 7).

Hanover Insurance Company and their attorneys' [sic] used entrapment upon the appellant a senior citizen to have him sign a release dated September 20, 1991, stating "In consideration of Twenty thousand ($20,000.00) dollars to me paid by Anthony Lauria and Hanover Insurance Company. . . . The settlement draft is to be paid within 30 days" (app. page 7).

Hanover never paid the appellant one penny, however, Hanover Insurance Company since September 20, 1991, have kept the appellant's signed release including the present date.

The appellant had a contract with Hanover and they failed to fulfill their obligation to Davis and pay him. "An agreement constitutes agreement between parties. . . . "*United States v. Windstar No.* 95-865.

After several attempts to resolve the appellees' breach of contract entrapment and fraud it proved to be

fruitless, Davis was compelled to take this matter before the Norfolk Superior Court.

March 10, 1993, Davis files his Complaint and Jury Claim in the Norfolk Superior Court in Dedham, Massachusetts.

September 24, 1993, Appellees filed a Motion For Summary Judgment.

Davis filed a timely objection to the Appellees' Motion for Summary Judgment.

There was oral argument of the appellees' Motion for Summary Judgment.

The Court allowed the appellees' Motion for Summary Judgment and dismissed the appellees' Counterclaims.

January 21, 1994, Davis files Notice of Appeal (app. page 8).

Norfolk Superior Court does not assemble the record and it is not forwarded to the Massachusetts Court of Appeals.

September 22, 1994, Davis files Second Notice of Appeal. Davis informed by the clerk that Judge Connolly does want this case to go to the Appeals Court.

Davis files third, fourth, fifth requests for Immediate assemble of the record and forward to the Appeal Court, however, the Norfolk Superior Court continues to inform Davis that Judge Connolly and the appellees' attorney do not want this case to go to the appeals court.

Finally, after filing six notices to assemble the record and forward the action to the Appeals Court failed and since appellant's Constitutional Rights were being denied, the appellant filed his Complaint in the United States District Court for the first circuit.

The matter is now before this Court for the issues presented for review.

III. ARGUMENT

1. THE LOWER COURT ERRED IN LAW IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The lower court erred in law in granting the defendants' Motion For Summary Judgment given the law, facts and evidence of the case.

The United States Constitution Amendment V: states in pertinent part:

> "cannot be deprived of life, liberty, or property, without due process of law".

The appellant had the Constitutional Right of due process of law.

The appellant had the right to due process of law when he was aggrieved by the Norfolk Superior Court's decision.

The appellant had the Constitutional Right to appeal the Norfolk Superior's Court decision to the Massachusetts Appeals Court, however, instead of assembling the record to the Massachusetts Appeals Court, Davis was informed that Judge Connolly and the appellees'

attorney does not want the case to go to the Appeals court.

The United States Constitution Amendment XIV; section 1. states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the law"

The lower court denied the appellant's right and privileges of due process of law and equal protection of the laws as set forth in the United States Constitution Amendments V & XIV.

The lower court has also denied appellant's rights and privileges of due process of law and equal protection of the law which are also applicable under the Constitution Of Massachusetts.

In addition, both Judge Connolly and the appellee's [sic] attorney Mark F. Mahnken knowingly and wilfully obstructed justice.

There are sufficient facts issues that the Appellant's Constitutional Rights were denied and sufficient facts that the appellant is a victim of obstruction of justice.

Based on the facts and evidence submitted to the court, there are a [sic] genuine and material issues and

sufficient evidence to require a jury to resolve the truth at time of trial such as the following issues.

(1) Whether Davis' Constitutional Rights were denied.

(2) Whether Davis received Equal Protection under the Constitution.

(3) Whether Davis received due process of law.

(4) Whether the appellees obstructed justice.

The evidence must be examined in the light most favorable to the plaintiff *LECLAIR V. SILBERLINE MFG.* 379 Mass. 21 at 23 (1979).

In reviewing a motion for summary judgment a court must consider the pleadings related documents, evidence and all reasonable inferences in a manner most favorable to the non-moving party *ADICKES V. S.H. KRESS & CO.* 398 U.S. 144, 90 S.Ct 1598, 26 L. Ed 2d 142 (1970)., *SMITH V. HUDSON* 600 F. 2d 60 (6th Cir. 1979).

Therefore, based on the foregoing facts and evidence the lower court erred in allowing appellees' Motion for Summary Judgment.

2. THE LOWER COURT ERRED IN NOT PROTECTING THE APPELLANT'S STATE & FEDERAL CONSTITUTIONAL RIGHTS

The lower court failed to protect the appellant's Federal and State Constitutional Rights.

Pursuant to the United States Constitution Amendments V and XIV the appellant is entitled to due process of law and equal protection under the law.

The Norfolk Superior Court, Judge Connolly and attorney Mark F. Mahnken violated the appellant's Constitutional Rights and obstructed justice by not allowing the appellant the right to due process of law and equal protection under the law.

The lower court failed to take any action in this miscarriage of justice.

3. THE LOWER COURT ERRED IN BASING ITS DECISION ON THE UNITED STATES CONSTITUTION THIRTEENTH AMENDMENT

The lower court erred in basing its decision on the Thirteenth Amendment (app. page 46).

The Thirteenth Amendment to the United States addresses the abolishment of slavery.

The abolishment of slavery is not an issue in this action.

4. THE LOWER COURT ERRED IN BASING ITS DECISION ON THE DEFENDANTS-APPELLEES WILFUL MISREPRESENTATION OF THE FACTS

The lower court erred in accepting from the appellees' that the action was not finalized.

The appellees misrepresented the facts to the court.

Mark F. Mahnken, was the appellees' first attorney and George R. Suslak the appellees' second attorney was informed that the appellant was appealing the action

because the case was finalized in the Norfolk Superior Court.

IV. CONCLUSION

Based on the foregoing facts and evidence the appellant requests this court to allow the following relief:

Damages for wilfully preventing the appellant from the appeal process the sum of $85,000.00, Punitive damages in the sum of $50,000.00 and all costs and legal fees which the court deems appropriate, or as an alternative remand to lower court for jury trial.

Respectfully Submited [sic] By,

/s/ Fred Davis
Fred Davis,
Plaintiff - Appellant
P.O. Box 721
Everett, Ma 02149

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the Appellant's Briefs and Appendix to: George R. Suslak, Stanton & Longe 200 Broadway P.O. Box 1080 Lynnfield, Ma 01940 Postage Prepaid.

DATE 9-17-96 /s/ Fred Davis

NOTICE OF LIEN

Notice is hereby given, pursuant to Massachusetts General Laws, Chapter 221 § 50 and pursuant to any and all other applicable law, that Attorney Stuart D. Ravech hereby claims a lien on any recoveries, whether by judgment, settlement or otherwise which maybe [sic] had and arising from all personal injuries suffered by Mr. Fred Davis on or about February 11, 1987 in Revere, Massachusetts.

Terms of said lien shall be in the amount of $7,500.00 of any recovery, settlement or judgment.

/s/ Stuart Ravech
Stuart Ravech, Esq.
RAVECH, ARONSON &
SHUMAN, P.C.
125 Summer Street
Boston, MA 02110
(617) 439-0200

DATED: April 26, 1991

RELEASE

September 20 1991

In consideration of Twenty thousand ($20,000.00) dollars to me paid by Anthony Lauria and Hanover Insurance Company the receipt whereof is hereby acknowledged I hereby remise, release and forever discharge the said Anthony Lauria and Hanover Insurance Company from all debts, demands, actions, causes of action, suits, dues, sum and sums of money, accounts reckonings, bonds, specialties, covenants, contracts, controversies, agreements, promises, doings, omissions, variances, damages, extents, executions and liabilities and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the said Anthony Lauria and Hanover Insurance Company or their heirs, executors, administrators, successors or assigns I now have or ever had from the beginning of the world to this date and more especially on account of personal injuries sustained by me on February 11, 1987 and the lawsuit now pending in the Boston Municipal Court, docket number T-41026. The settlement draft is to be made payable to Fred Davis and his attorney, Robert T. Abrams. The draft is to be paid within 30 days.

Executed as a sealed instrument this day and year above written.

Signed in presence of /s/ Fred Davis

/s/ Robert T. Abrams

Lawyers Stationery Co.,
Boston Form-23

DRISCOLL, GILLESPIE & STANTON
ATTORNEYS AT LAW

NEIL R. DRISCOLL
PAUL J. GILLESPIE
RICHARD M. STANTON
MARK F. MAHNKEN
JOHN J. LANG
DANIEL M. O'REILLY
PHILIP C. WYSOR
CHRISTOPHER J. O'ROURKE
DAVID W. PERRY
JOANNE DRISCOLL CAMPBELL
JOHN F. NEELON
MARY ANN CALNAN
GEORGE R. SUSLAK
ELIZABETH A. FLEMING
DONALD E. HAMILL, JR.
THOMAS J. FREEMAN

P.O. BOX 850
LYNNFIELD WOODS OFFICE PARK
200 BROADWAY
U.S. ROUTE 1, SOUTH
LYNNFIELD, MA 01940-2314
(617) 596-2200
TELECOPIER (617) 592-5570

September 24, 1991

Robert T. Abrams
50 Union Street
Newton, MA 02159

RE: Fred Davis
VS: Anthony Lauria
NO: T-41026

Dear Attorney Abrams:

I am in receipt of the Release and your letter of September 20, 1991. My reading of M.G.L. Ch.221 s.50 is that I am compelled to name Attorney Ravech on the settlement draft, notwithstanding the fact that he may not have noted his lien on the docket. Would you kindly resolve this matter with Attorney Ravech so that we may resolve this case.

Thank you.

Very truly yours,

DRISCOLL, GILLESPIE & STANTON

/s/ Mark F. Mahnken
Mark F. Mahnken

MFM/pm

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
No. 93 00574

FRED DAVIS, Plaintiff V. HANOVER INSURANCE COMPANY, et al Defendants	COMPLAINT JURY TRIAL REQUESTED ON ALL COUNTS

1. Plaintiff, Fred Davis, of Malden, County of Middlesex, Commonwealth of Massachusetts.

2. Defendant, Hanover Insurance Company, of Braintree, County of Norfolk, Commonwealth of Massachusetts.

3. Defendant's usual place of business is located at 33 Braintree Hill Park, Braintree, Massachusetts.

COUNT I

September 20, 1991, plaintiff signed a contract with Hanover Insurance Company under the following terms and conditions: (1) amount of consideration $20,000.00, (2) draft payable to Fred Davis and his attorney Robert T. Abrams. (3) Draft is to be paid within 30 days. (4) this contract was executed as a sealed instrument.

Hanover Insurance Company knowingly and wilfully breached this contract. Hanover failed to fulfill its obligation.

As a result of this breach of the contract the plaintiff sustained monetary losses, pain and suffering and harassment.

COUNT II

CAUSE OF ACTION

The plaintiff and defendant entered into a contract, however, the defendant knowingly and wilfully breached the terms and conditions of the contract.

Hanover Insurance Company did not fulfill its obligation to the plaintiff, causing him monetary losses, pain and sufering [sic] and harassment.

COUNT III

M.G.L. c. 93A

At all times relevant to this action defendant was engaged in trade or commerce in the Commonwealth of Massachusetts within the meaning of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Company as described herein were unfair and deceptive within the meaning of M.G.L. c. 93A.

The acts and practices of the defendant were wilful and knowing violations of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Co. were unfair and deceptive within the meaning of M.G.L.

c. 93A and as a result plaintiff suffered substantial losses of money.

COUNT IV

The plaintiff is a senior citizen.

Hanover Insurance Company wants to cheat the plaintiff out of monies that are due to him.

The defendants acts are also being used to harass, hurt and harm the plaintiff.

V. RELIEF FROM THE COURT

Plaintiff requests the following relief from the court:

1. Amount of contract $20,000.00.
2. Interest from September 20, 1991
3. Pain and suffering $10,000.00.
4. Pursuant to M.G.L. c. 93A double or triple damages along with interest from September 20, 1991.
5. Costs, legal fees and other relief the court may deem appropriate.

Jury trial requested on all counts.

By,

/s/ Fred Davis

Fred Davis
353 Bryant Street
Malden, Ma. 02148
(617) 322 8578

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
No. 93 00574

FRED DAVIS,
Plaintiff

vs.

HANOVER INSURANCE COMPANY,
Defendant

DEFENDANT HANOVER INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

Now comes the defendant Hanover Insurance Company in the above-entitled action and moves this Honorable Court to grant its motion for Summary Judgment. In support thereof, Hanover has filed this memorandum of law, stating that there are no genuine issues of material facts and that Hanover is required to honor an attorney's lien in issuing its settlement draft under the applicable standard of Massachusetts law.

STATEMENT OF FACTS

The plaintiff, Fred Davis has filed suit herein and alleges that Hanover Insurance Company has breached a contract with him, and also violated M.G.L. Ch.93A by refusing to issue a settlement draft in the amount of $20,000.00 to his attorney, Robert T. Abrams and himself,

without naming a lienholder on the draft. The plaintiff also alleges that Hanover has no right to include the name of his first attorney, Stuart Ravech, who initially represented the plaintiff and who, on plaintiff's behalf, filed a personal injury suit in a case entitled *Fred Davis V. Anthony Lauria, Boston Municipal Court, Docket #:T-41026.* The plaintiff states that Hanover Insurance Company ("Hanover") breached the terms of an agreement to settle the personal injury tort case in order to "cheat" and "harass" him and to take advantage of a "senior citizen".

It is the position of Hanover that under the requirements of Massachusetts law, it must honor an attorney's lien of which it has been given notice, or risk being sued by the attorney. Further, it is Hanover's position that at all times it was willing and able to honor the terms of the personal injury settlement and in no way attempted to cheat or harass the plaintiff.

On or about February 2, 1987 the plaintiff alleges that he was injured as a result of a motor vehicle accident which occurred in Revere when he was struck by a vehicle driven by Mr. Lauria (Hanover's insured). The plaintiff was first represented by Attorney Stuart Ravech, who filed a personal injury suit in the Suffolk County on January 22, 1990. With leave of Court, Attorney Ravech withdrew as counsel on April 26, 1991. Concurrently, Attorney Ravech filed an attorney's lien with Hanover and with plaintiff's subsequent counsel, Attorney Robert T. Abrams (see notice of lien, attached hereto as Exhibit A).

In September of 1991, counsel for the parties entered into a settlement agreement in the amount of $20,000. By

agreement with Attorney Abrams, Hanover issued the settlement draft payable to the plaintiff, and attorneys Ravech and Abrams (see correspondence from Attorney Abrams dated September 26, 1991, attached as Exhibit B and settlement draft attached as Exhibit C). The plaintiff did not want Hanover to honor the attorney's lien, however, Attorney Abrams represented to Hanover's attorney that the plaintiff would resolve the fee dispute with Attorney Ravech through the Massachusetts Bar Association (Exhibit B).

Accordingly, Hanover issued the settlement draft payable to "Fred Davis, Attorney Robert T. Abrams, and Attorney Stuart D. Ravech," however, the plaintiff refused to endorse the check, and has demanded that Attorney Ravech's name be removed. In order to resolve this dispute, Hanover has offered to execute two drafts, one payable in the amount of $12,500.00 payable to the plaintiff and Attorney Abrams, and one payable to plaintiff, Attorney Abrams and Attorney Ravech in the amount of $7,500.00 (the amount of the lien). (See correspondence from Hanover dated February 14, 1992, attached here as Exhibit D). The plaintiff has declined this offer, and has insisted that the check be made payable only to Attorney Abrams and himself, without naming the lienholder. In addition, he filed a complaint against Hanover with the Division of Insurance, and the instant lawsuit alleging breach of contract and violations of M.G.L. Chapter 93A.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A case alleging unfair or deceptive acts or practices is an appropriate matter from summary judgment only if there is no genuine issue of material fact. *Noyes v. Quincy Mutual Fire Insurance Co.*, 7 Mass. App. 723 (1979). Summary judgment should be entered when there is no genuine issue of material fact and when there is substantive law under which judgment may be entered for the moving party. *Theran v. Rokoff*, 413 Mass. 590, 602 N.E.2d 191 (1992). To avoid summary judgment, an opposing party may not rest on his pleadings or general denials, he must set forth specific facts showing that there is a genuine triable issue. *Turner v. McAne*, 4 Mass. App. 864, 357 N.E.2d 942 (1976).

II. SUMMARY JUDGMENT SHOULD BE ENTERED ON COUNTS I AND II OF THE PLAINTIFF'S COMPLAINT AS THERE IS NO EVIDENCE THAT HANOVER BREACHED ITS CONTRACT WITH PLAINTIFF, AS HANOVER IS REQUIRED UNDER MASSACHUSETTS LAW OF HONOR THE ATTORNEY'S LIEN FROM PLAINTIFF'S FIRST ATTORNEY

In the instant case, the plaintiff alleges in Counts I and II of his Complaint, filed Pro Se, that Hanover entered into a contract to settle his personal injury suit for $20,000.00, payable to Fred Davis and his attorney, Robert T. Abrams, to be paid within thirty days. The plaintiff further alleges that Hanover thereafter knowingly and willfully breached this contract, causing the plaintiff to sustain monetary losses, pain and suffering

and harassment. In Count II, the plaintiff reavers that the defendant breached the terms of its contract.

It is agreed upon that plaintiff and Hanover entered a settlement agreement by which the plaintiff would receive $20,000.00 in settlement of his personal injury law suit. On September 20, 1991, a Release was signed by the plaintiff Exhibit I). However, well prior to issuing the check, Hanover was notified that there was an attorney's lien on the file by Attorney Stuart Ravech, the plaintiff's first attorney. The plaintiff's second attorney, Robert T. Abrams, notified Hanover to make the check payable to the plaintiff and Attorneys Ravech and Abrams and that the plaintiff would resolve the fee dispute with Attorney Ravech through the Massachusetts Bar Association Exhibit B). After Hanover issued the Settlement draft, the plaintiff refused to endorse the check. Hanover offered to issue two drafts, one payable to plaintiff and Attorney Abrams in the amount of $12,500.00 and one payable to plaintiff and Attorney Abrams and Attorney Ravech in the amount of $7,500.00, but plaintiff refused this offer and filed suit.

Breach of contract connotes the violations of a contractual duty which one person owes to another. 14 Simpson, *Mass. Practice Series s.271.* Non-performance of a contract is the failure to perform the whole or a material part of a contract, whether or not the party so failing to perform was, under the circumstances existing at the time, legally bound to render performance. *Realty Developing Co., Inc. v. Wakefield Ready-mixed Concrete Co.* 327 Mass. 535, 100 N.E.2d 28.

There may be an agreement of the parties, subsequent to the making of the contract substituting new terms, or a new contract or a new or different performance, or the contract may have been waived by agreement of the parties. In such case, non-performance of the terms of the original contract would not constitute a breach of it. *Cueovon v. Coburnville Garage, Inc.* 315 Mass. 135, 52 N.E.2d 16. Pertinent to the instant action, however, at no time did Hanover Insurance represent to plaintiff that it would not honor the attorney's lien. Applying the above law to the present case, it is argued by Hanover that it did not breach the settlement agreement entered into between the parties in September, 1991. When Hanover became aware of the attorney's lien placed on the plaintiff's case, it was obligated under Massachusetts law to honor the attorney's lien from plaintiff's first attorney or risk being sued if it ignored the lien in issuing the settlement draft to plaintiff without the name of the lienor. The addition to Attorney Ravech's name on the settlement draft was not a breach of the settlement agreement because Attorney Abrams had prior notice that Hanover would honor the attorney's lien (See Exhibit G and Exhibit H). It is well-settled under Massachusetts statutory and case law that an attorney's lien comes into being once suit is commenced by an attorney on behalf of her client. M.G.L. c. 221, s.50. See, *In re Hoy's Claim*, D.C. Mass., 93 F. Supp. 265. The right given to an attorney under G. L. 221, s. 50, purporting to confer an attorney's lien upon a cause of action from the authorized commencement of action, is a substantive right and not a procedural right. Id. Moreover, the statutory lien for attorney's fees is a charging lien which binds

judgment or money decree for payment of expenses incurred and for services rendered by attorney with respect to particular action or suit. *Torphy v. Reder,* 257 N.E.2d 435, 357 Mass. 153, appeal after remand 277 N.E.2d 528, 360 Mass. 869 (1970).

It has been held by the United States District Court that if a tort claimant's attorney filed suit before, even one minute before, the claimant (without the attorney's knowledge) released his claim against the defendant, the attorney has a lien on his client's cause of action. *Thurston v. Hutchinson,* D.C. Mass., 93 F. Supp. 265 (applying M.G.L.A c. 221 S. 50). While a release may have discharged the defendant's liability to the plaintiff, it leaves the defendant liable to the attorney to the extent of his lien, if the attorney filed suit on behalf of his client before the release was executed, and the defendant knew that fact. "This lien made it impossible finally to dispose of this suit without his (the attorney's) consent; the defendant was charged with notice of the lien, and he (the attorney) could have forced the defendant to pay a second time had it (the defendant) disregarded his (the attorney's) rights. *Woodbury v. Andrew Jergens Co.,* 69 F.2d 49, 50. Hanover requests that the Court grant Summary Judgment in its favor on Counts I and II of the plaintiff's Complaint.

III. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF HANOVER ON COUNT III BECAUSE PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR 93A VIOLATION- THAT HANOVER ENGAGED IN UNFAIR OR DECEPTIVE ACTS

Under M.G.L. 93A, once the plaintiff has established that he is a "consumer" and that the transaction giving rise to his Complaint is one covered by c.93A, he needs to show that the defendant's acts were "unfair" or "deceptive". There is no general rule as to what constitutes an unfair or deceptive act or practice. *35 Mass. Pract. S. 130 (Alperin & Chase).* A special procedural requirement to a summary judgment action is that the consumer must mail or deliver to the prospective defendant, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon the the [sic] injury suffered." M.G.L.A. c. 93A(3).

An important hurdle for the consumer to overcome in prevailing in a 93A action is for the consumer to show that he has suffered a "loss of money or property, real or personal", as a result of the defendant's use of an unfair or deceptive act or practice. M.G.L.A. c.93A s.9(1).

In the present case, the plaintiff has failed to allege and plead the presentation of a demand pursuant to M.G.L. Ch.93A, paragraph 3 (exhibit J). The thirty day demand letter has been held to be a jurisdictional prerequisite to filing a consumer claim under M.G.L. Ch.93A. *Spring v. Geriatric Authority* 394 Mass. 274, 287. 475 N.E. 2d 727, 735 (1985). A demand letter describing the specific unfair practices claimed and listing the damages suffered is a prerequisite to suit and must be alleged and

proved. *Baldassari v. Public Finance Trust* 337 N.E. 2d 701, 369 Mass. 33. Even if plaintiff had made a proper presentation of his 93A claim, Hanover argues that it was nonetheless required to honor Attorney Ravech's lien or risk being sued for the claimed amount in issuing the full settlement check to plaintiff and his second attorney. Even the plaintiff's second attorney was in agreement with Hanover's agreement to issue the check payable to plaintiff and Attorneys Ravech and Abrams (Exhibit B).

In light of the above, Hanover requests the Court to enter Summary Judgment in its favor on Count III of the plaintiff's Complaint.

IV. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF HANOVER ON COUNT IV OF THE PLAINTIFF'S COMPLAINT AS PLAINTIFF FAILS TO SET FORTH FACTS SHOWING HANOVER HAS ATTEMPTED TO CHEAT THE PLAINTIFF OUT OF MONIES OWED

In Count IV, it appears that plaintiff is alleging that Hanover is attempting to cheat him out of monies owed, due to the fact that he is a senior citizen (Complaint, Exhibit J).

The plaintiff, however, has failed to allege facts sufficient to raise a question as to fraudulent intent on the part of Hanover, but only states that Hanover refused to issue a settlement check payable only to him and his second attorney. These allegations impermissibly ignore Hanover's statutory responsibility to honor the attorney's lien.

In a recent case entitled *Equitable Life Assurance Society of the U.S. v. Porter-Englahart*, C.A.1 (Mass) 1989, 867 F.2d 79, the United States District Court examined a 93A claim filed by a widow alleging unfair and deceptive insurance claim settlements. The Court found that the widow was not entitled to multiple damages from insurer based on its payments of the widow's share of accidental death benefits into court in an interpleader action involving dispute as to another portion of death benefits. Id. The Court denied widow's claim for damages reasoning that there was no indication of bad faith on the insurer's part where the insurer gained nothing for itself by holding the funds back.

In applying the above law to the present facts, it is Hanover's position that at no time did it intend to or did it cheat the plaintiff out of settlement monies. In fact, Hanover issued the check in the manner agreed to by plaintiff's attorney, Mr. Abrams, who at least tacitly acknowledged that Hanover had a legal obligation to honor Attorney Ravech's lien. (Also see Affidavit of Larry Roberson, Claim Manager of Hanover, attached hereto as Exhibit E). Furthermore, the plaintiff has failed to state any facts supporting his claim that Hanover's actions were intended to harass, hurt or harm the plaintiff. At all times it has been Hanover's intention to resolve the matter lawfully, amicably and efficiently.

In light of the foregoing, Hanover requests the Court to enter Summary Judgment on Count IV of the plaintiff's Complaint.

V. CONCLUSION

Applying the above law to the instant case, it is argued on behalf of Hanover that since it had notice of Attorney Ravech's lien since April 1991, that it could not ignore the lien in issuing the settlement draft without risking paying a second time. Furthermore, based on a reading of the statutory language of G.L. 221, S. 50 (attached hereto as Exhibit F), it is undisputed that once an attorney has instituted an action on behalf of a client, that the attorney has a lien for his reasonable fees and expenses. Even if Attorney Ravech had not filed an attorney's lien with the court prior to the time of settlement, as a matter of law his lien was in existence and must be honored by Hanover.

In light of the above, Hanover respectfully request [sic] this Honorable court to grant its Motion for Summary Judgment. The plaintiff has failed to set forth any facts establishing breach of contract, fraud or violations of M.G.L. 93A. The only matter properly before this court is whether of [sic] not the attorney's lien filed by Attorney Ravech must be honored. At all times, Hanover has conducted itself in accordance with the statutory requirements and in good faith in dealing with the plaintiff and his attorneys.

Furthermore, the statutory and case law of Massachusetts supports that as a matter of law, that Attorney Ravech's lien must be honored by Hanover in issuing its settlement draft or risk being sued by Attorney Ravech.

Hanover Insurance Company,
by its attorney,

/s/ Mark F. Mahnken

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(617) 596-2200
BBO: #314-400

Dated: 8/25/93

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO. 93-00574

****

FRED DAVIS,
PLAINTIFF

VS.

HANOVER INSURANCE COMPANY, ET AL.

DEFENDANTS

****

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff, Fred Davis in the above-cited action and opposes the defendants' motion for Summary Judgment and moves the court to deny the defendants' motion for Summary Judgment.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The plaintiff, Fred Davis is a senior citizen (hereinafter referred to as Davis) resides at 353 Bryant Street Malden, Massachusetts.

February 11, 1987, Anthony Lauria negligently operated a motor vehicle causing a motor vehicle accident.

As a result of this accident, Davis received severe bodily injuries resulting in partial permanent disability.

Since the accident, up to and including the present Davis has been under the care of a physician.

In addition David [sic] has lost a large amount of wages and excessive damage to his motor vehicle.

Prior to the accident, Davis was employed at both Suffolk Downs Race Track (days) and Wonderland Race Track (evenings).

As a result of the accident Davis was discharged from Suffolk Downs and is unable to work at Wonderland because he is unable to work full time and Wonderland cannot comply with a work schedule that meets Davis' needs.

On or about January 18, 1989, Davis appeared at the law offices of Ravech, Aronson & Shuman, Davis spoke with Thomas J. Hannon, he took all the information of the motor vehicle accident (later I learned that Mr. Hannon was not an attorney although he acted in the capacity of an attorney).

Some time later, Davis received a telephone call from Ronald Gluck informing him that Mr. Hannon left the employ of the firm and that he would be handling Davis' case.

He also informed Davis that since Hanover Insurance Company had not made any offers for settlement, he was going to take the matter into court.

January 22, 1990, Ronald E. Gluck filed Complaint is Suffolk Superior Court in behalf of Davis.

April 26, 1991, Stuart Ravech went before the court stating that he wanted to withdraw from the case, He did not request any money from the court nor did the court grant him any monies.

Moreover, he informed Davis he did not want any monies.

Since there were several motions pending, Davis engaged the services of attorney Robert T. Abrams.

Davis was informed by Mr. Abrams that he had an offer of a settlement of $20,000.00 from the defendants.

This offer was accepted by Davis.

Mr. Abrams informed Davis that he would be hearing from the defendants' attorney and he would inform Davis when to come to his office and sign the release.

September 12, 1991, attorney Abrams received a letter from Mark F. Mahnken outlining the defendants impute in the release which states in pertinent part:

> "Kindly provide a Release in the amount of $20,000.00 and I would appreciate your having Hanover Insurance Company named on the Release, also."

There was no additional terms or conditions by the defendants other than stated above.

Davis complied with this request and Hanover Insurance Company was named on the Release and signed by Davis.

September 20, 1991, Davis signed the release in compliance with all defendants terms and conditions as

stated above. This Release was witnessed by Robert T. Abrams.

After Davis signed the release, fraud, unfair and deceptive business practices were employed by the defendants.

Davis is a victim of fraud in a bait and switch deal in the hands of the defendants.

The bait is sign the release and you will be paid $20,00.00 [sic] for your bodily injuries.

The switch comes you don't get $20,000.00. We will only give you $13,500.00. There's a lien. However, there is no lien. The story of a lien is completley [sic] false as there is no lien requested in the court. This false statement of a lien is merely a pretext to cheat and swindle monies out of Davis.

These fraud, unfair and deceptive business practices that the defendants engage in appears not only to rip off Davis but the public interest is also in jeopardy.

After several attempts to resolve the defendants' breach of contract proved fruitless Davis was compelled to take this matter before this court.

II. ARGUMENT

A. DEFENDANTS KNOWINGLY AND WILFULLY BREACH CONTRACT

September 20, 1991, Davis entered into a contract with the defendants.

The contract with the defendants was specific, definite clearly understandable and contained no complex language (Plaintiff's Exhibit "A" page 34).

September 12, 1991, prior to the plaintiff's signing of this contract, the defendants attorney placed his impute in the formulation of the contract, by inserting the following pertinent part:

"Kindly provide a Release in the amount of $20,000.00 and I would appreciate your having Hanover Insurance Company named on the Release, also" (Plaintiff's Exhibit "B" page 35)

Davis complied with defendants terms and conditions. As the court can clearly see there were no other conditions to be met.

After Davis signed the release and it was in the possession of the defendants, now the picture changes and the defendants knowingly and wilfully refused to fulfill their obligation and pay Davis in compliance with the terms and conditions of the contract.

The defendants have Davis' release in their possession since September 20, 1991 to and including the present. Davis has not been paid nor has the release been returned to Davis.

General Laws c 176D § 3(9)f inserted by St. 1972, c. 543, § 1), provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear". General Laws c. 93A. § 2(a) (inserted by St. 1967 c. 813 § (1), covers such insurance practices in its prohibition of "unfair or deceptive acts or

practices in the conduct of any trade or commerce". *DODD V. COMMERCIAL UNION INSURANCE COMPANY* 373 Mass. at 78, and provides for recovery of up to three but not less than two times actual damages. . . . "

The defendants knowingly and wilfully breached the contract with one purpose and one purpose only and that is to fraud, use unfair and deceptive business practices to swindle and cheat Davis, a senior citizen out of $20,000.00

B. DEFENDANTS USING CONTRACT TO CONTINUE WITH ACTUAL INTENT TO MISLEAD, DECEIVE AND FRAUD THIS COURT

The defendants are holding plaintiff's contract in their possession to continue with actual intent to mislead, deceive and fraud this court.

The defendants also are continuing to use fraud, unfair and deceptive business practices to swindle and cheat Davis out of the action in this court.

April 12, 1993, the defendants filed with this court a document entitled. "Memorandum in support of defendant's opposition to plaintiff's motion to strike defendant's answer" contained the following pertinent part: "That personal injury litigation was terminated by means of an agreement to release the liability of the defendant in exchange of $20,000.00 to Fred Davis" (Plaintiff's Exhibit "C" page 37).

This statement was done with the actual intent to act in bad faith, mislead, deceive and fraud the court, "an act done with actual intent to mislead or deceive another is an act in bad faith" *GROH V. VIGLET* 34 Ohio Law R 132,

"Bad faith and fraud are synonymous" *HILGENBERG V. NORTHRUP* 33 N.E. 786, 787, 134 In 92.

If, Davis received $20,000.00 he would not have been compelled to take this action.

The defendants are knowingly and wilfully acting in bad faith, continuing to employ their fraud, unfair and deceptive business practices to swindle and cheat Davis out of monies that they agreed to in the contract which was signed by Davis in good faith.

C. THERE IS NO LIEN THE DOCUMENTS SUBMITTED BY DEFENDANTS APPEAR TO BE FRAUDULENT

The defendants are continuing to act in bad faith and misrepresenting the facts in this court in the same manner that they did in other courts.

THERE IS NO LIEN in this action.

M.G.L. Chapter 221 § 50 ". . . . Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien:. . . . "

There is no lien in the courts and the defendants agreed that no request of liens were made to the courts.

Davis was never informed of a lien prior to his signing of the contract nor was there any stipulations in the contract that there was a lien and Ravech's name would appear on the draft. (Plaintiff's Exhibit "A" Page 34).

Stuart Ravech went before the court to withdraw at that time he did not request any monies or did the court grant him any monies.

He informed Davis he did not want any monies he just wanted to get off the case.

In other proceedings when Davis was compelled to represent himself. Ravech informed the judge he wanted to get off the case, because he said, "that if he remained on the case he would be held for malpractice."

Since he did not perform zealously nor did he act in Davis' best interest Davis was compelled to represent himself on various motions such as: "Plaintiff's Opposition To Defendant's Motion For Order Granting Access To Criminal Offenders Record Information Concerning the Plaintiff" (Plaintiff's Exhibit "D" Page 40) along with other documents.

The defendants know that they have no defense in this action, therefore, they submitted documents what appear to be fraudulent in order to try to produce something for the court.

(1) In "Memorandum In Support Of Defendant's Opposition to Plaintiff's Motion to Strike Defendant's Answer" defendants affixed a lien Exhibit "A" (Plaintiff's Exhibit "C" page 39).

(2) In "Motion For Summary Judgment Defendants affixed a lien Exhibit "A" (Plaintiff's Exhibit "E" page 42).

These documents are not identical. Documents do not bear the same signature.

Therefore, it is apparent that these documents are fraudulent and were submitted with the actual intent to mislead, deceive and fraud the court.

It also questions the credibility of the sworn affidavit of Larry Roberson, Claims Manager of Hanover Insurance Company.

Based on the foregoing facts there are all indication that the defendants compiled these documents for the benefit of having some sort of defense.

D. RAVECH NOT PLAINTIFF'S FIRST ATTORNEY

Here again, the defendants knowingly are misrepresenting the facts to the court. Ravech was not Davis' first attorney and the defendants were fully aware of this fact including their attorney Mahnken.

Defendants state ". . . . his first attorney, Stuart Ravech, who initially represented the plaintiff. . . . " (Motion for Summary Judgment page 1).

Defendants state: "The plaintiff was first represented by Attorney Stuart Ravech, who filed a personal injury suit. . . . " (Motion For Summary Judgment page 2).

Defendants state: "Attorney Stuart Ravech, the plaintiff's first attorney. . . . " (Motion For Summary Judgment page 5).

The above statements by the defendants are false.

Ravech was not Davis' first attorney nor did he file a personal injury suit.

Davis was under the impression that Thomas Hannon was his first attorney (later he found out he was not an attorney although he acted in the capacity of an attorney). Later was informed by Ronald Gluck that he was going to represent him. Davis did not engage Ravech to represent him. As a matter of fact, Davis discovered Stuart Ravech to be a LEGAL ASSISTANT (Plaintiff's Exhibit "F" page 43).

January 22, 1990, Ronald Gluck filed Complaint in the Suffolk Superior Court, Board of Bar Overseers number 195960. (Plaintiff's Exhibits "G" and "H" pages 44 and 46.

January 23, 1990, tracking order from Barbara J. Rouse sent to Ronald E. Gluck (Plaintiff's Exhibit "I" page 47).

Lists of physicians bills and visits mailed to Ronald E. Gluck (Plaintiff's Exhibits "J" and "K" pages 48 & 49).

Defendants attorney was fully aware that Stuart Ravech was not Davis' first attorney. Attorney Mahnken corresponded with attorney Gluck and sent copies of the documents he sent to the court to him.

April 25, 1990, letter sent to the Clerk of Courts: ". . . . 1. Answer and Affirmative Defenses: and 2. Certificate of Service." copy to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "L" page 50).

April 25, 1990, letter sent to Ronald E. Gluck Esq. ". . . . I have agreed to accept service of processs [sic],. . . . " (Plaintiff's Exhibit "M" page 51).

May 1, 1990, letter sent to the Clerk of Courts: ". . . . 1. Defendant, Anthony Lauria's Answers to Plaintiff's

Interrogatories: and 2. Certificate of Service. . . . " Copy to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "N" page 52).

May 15, 1990, letter sent to the Clerk of Courts: ". . . . 1. Defendant, Anthony Lauria's Interrogatories to be answered by the Plaintiff, Fred Davis: and (a) Certificate of Service Copy to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "O" page 53).

July 9, 1990, letter sent to the Clerk of Courts: ". . . . 1. Defendant, Anthony Lauria's Application Pursuant to M.R.C.P. 33(a) for Entry of Judgment for Dismissal: and 2. Certificate of Service. (Plaintiff's Exhibit "P" page 54). Copy to Ronald E. Gluck, Esq.

Based on the foregoing facts and evidence clearly shows that the defendants and their attorney Mahnken were fully aware that Ravech was not plaintiff's first attorney.

E. DEFENDANTS' USING A COVER-UP TO SWINDLE AND CHEAT MONIES FROM DAVIS

Defendants are using a cover-up by stating that attorney said that they could put Ravech's name on the settlement draft.

Davis signed a release which clearly states the conditions of this release and this release was witnessed by attorney Abrams (Plantiff's [sic] Exhibit "A" page 34).

Thursday August 26, 1993, at 11:38 A. M., Davis telephoned attorney Abrams and Abrams informed him that he did not authorize Ravech's name on the draft.

Moreover, Davis never authorized any changes in the release.

In fact, Abrams is the the one that returned the first check to Hanover Insurance Company because it did not meet with the terms and conditions of the release.

October 16, 1991, attorney returned the draft to Hanover Insurance Company because it did not comply with the terms and conditions of the release. Context of letter in pertinent part: ". . . . I am returning the $20,000. settlement draft to you. Will you kindly issue a replacement draft made payable to Fred Davis and his attorney, Robert T. Abrams, as specified in the enclosed release dated September 20, 1991" (Plaintiff Exhibit "Q" page 55).

After the defendants received Davis's release, they employed fraud, unfair and deceptive business practices.

Defendants had Davis believe that he was going to receive $20,000.00 for his bodily injuries, however, they used the famous bait and switch deal on him.

BAIT: First you sign the contract then you will receive a settlement check of $20,00.00 [sic] payable to Fred Davis and Attorney Robert T. Abrams. Davis never received a check in the $20,000.00 payable to Fred Davis and his attorney Robert T. Abrams, as a matter of fact Davis' name never appears on checks that were returned to defendants because they did not comply with the terms and conditions of the contract. Check returned by Attorney Abrams: Payable to "Robert T. Abrams, Attorney for Fred Davis & Stuart Ravech, Esq." (Plaintiff's Exhibit "R" page 56). Check returned by Davis because it did not comply with terms and conditions of the contract.

Check returned by Davis: Payable to "Robert T. Abrams Atty For Fred Davis and Stuart Ravech Esq. (Plaintiff's Exhibit "S" page 57).

SWITCH: Checks issued not in compliance with with terms and conditions of release.

Checks now issed [sic] to be payable to "Robert T. Abrams atty for Fred Davis and Stuart Ravech Esq.

Now that, this switch is not in their favor. They employ switch two: There a lien. There is no lien request in the court. They employ switch three: documents that appear to be fraudulent in the court. Defendants employ switch four: Defendants inform Davis that they will issue a check for $13,500.00. Defendants employ switchfive [sic]: Misrepresent the facts to the court by making the following statement: "That personal injury litigation was terminated by means of an agreement to release the liability of the defendant in exchange of $20,000.00 to Fred Davis" However, omitting the fact that Davis has not been paid one penny and that they breached the contract and have had the contract in their possession sin [sic]. September 20, 1991, up to and including the present. They are using this contract for their own personal gains to swindle and cheat Davis out of monies. Defendants employ switch five: Again, knowingly and wilfully with actual intent fraud, mislead and deceive the court with a Summary Judgment. The summary judgment is merely a continuing of misrepresentation of the facts and submitting documents that appear to be fraudelent [sic]. The bottom line is that they would do anything to swindle and cheat Davis out of monies.

October 16, 1991, Attorney Abrams returned the draft $20,000.00 to the defendants. "I am returning the $20,000.00 settlement draft to you. Will you kindly issue a replacement draft made payable to Fred Davis and his Attorney, Robert T. Abrams, as specified in the enclosed release dated September 20, 1991. (Plaintiff's Exhibit "Q" page 55).

Defendants failed to comply with Attorney Abrams demands.

Defendants started to harass Davis by mailing checks to him that were payable to Robert T. Abrams Atty For Fred Davis & Stuart Ravech, Esq., knowingly that this was in breach of the contract. These acts were done with malice to harass Davis. Davis returned these checks.

Davis made several telephone calls over the months to Mr. O'Brien in the hopes of resolving this breach of the contract. Although he left his telephone number with Mr. O'Brien's secretary to return his calls, Mr. O'Brien never returned his calls.

Finally on January 29, 1992, Davis wrote to Mr. O'Brien which states in pertinent parts: ". . . . issue a new draft payable to Fred Davis and his attorney, Robert T. Abrams, as stated in the release that I signed forthwith. "The overall facts also reveal there is fraud, wilful deceptive business practices and using the United States Mail to commit fraud, on the part of the Hanover Insurance Company". (Plaintiff's Exhibit "T" page 58).

February 21, 1992, Davis wrote to Mr. O'Brien which states in pertinent part: "Mr. Roberson's letter is merely a continuation of the on going conspiracy, fraud, wilful

deceptive business practices and using the United States mail to commit fraud." "I am again requesting you for the *SECOND TIME* to issue a draft payable to Fred Davis and his attorney Robert T. Abrams as stated in the release that I signed in the amount of $20,000.00 plus interest, since you have withheld this money from me for several months (Plaintiff's Exhibit "U" page 60). There was no response from the defendants.

General Laws c 176D § 3(9)(f) inserted by St. 1972, c. 543, § 1), provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonable clear". General Laws c. 93A, § (1), covers such insurance practices in its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". *DODD V. COMMERCIAL UNION INSURANCE COMPANY* 373 Mass. at 78, "and provides for recovery of up to three but not less than two times actual damages. . . . "

Therefore, based on the above-cited facts and evidence Davis is entitled to double or triple damages.

G. PUBLIC INTEREST INVOLVED

Davis was a victim of fraud, unfair, deceptive business practices and swindled out of $20,000.00 by the defendants.

Since the plaintiff was a victim of fraud, unfair and deceptive business practices in the hands of the defendants, there are strong possibilities that there have been

other victims or there will be other persons victimized by the defendants.

Therefore, the issue becomes if Davis is a victim of fraud, unfair and deceptive business practices and swindled out of monies by the defendants, the public interest is also in jeopardy and must be protected from these acts by the defendants.

H. THERE ARE GENUINE AND MATERIAL ISSUES INVOLVED IN THIS ACTION

There is an issue of tarnished credibility of the defendants, knowingly and wilfully misrepresented the facts of the case to the court. Defendants submitted to the court documents that appear to be fraudulent.

Based on conflicting facts and evidence submitted to the court by Davis, there are a genuine and material issues and sufficient evidence to require a jury to resolve the parties' versions of the truth at time of trial.

(1) Whether or not defendants breached contract.

(2) Whether or not defendants knowingly and wilfully breached contract.

(3) Whether or not Davis is entitled to double or triple damages in pursuant to General Laws c. 93A.

(4) Whether or not Davis is entitled to interest from September 20, 1991.

(5) Whether or not Davis is entitled to pain and Suffering because of the breach of contract.

(5) Whether or not Davis is entitled to legal fees, costs or any other relief the court may deem appropriate.

The evidence must be examined in the light most favorable to the plaintiff *LECLAIR V. SILBERLINE MFG.* 379 Mass. 21 at 23 (1979)

I. ATTORNEY MAHNKEN, KNOWINGLY AND WILFULLY VIOLATED THE CANON RULES AND ACTING IN BAD FAITH IN THE SAME MANNER AS HE DID IN THE SUFFOLK SUPERIOR COURT

CANON 1 – DISCIPLINARY RULES

DR1-102 MISCONDUCT

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

Attorney Mahnken knowingly and wilfully violated these disciplinary rules.

He knowingly and wilfully engaged in conduct involving dishonesty, fraud, deceit and misrepresentation.

He submitted to the court statements to the court in his documents that are dishonest, and documents that appear to be fraudulent in order to deceit and misrepresent the facts to the court.

He used Davis contract for the purpose of prejudicing the court into believing that Davis was paid $20,000.00, when in fact Davis was not paid one penny.

This misconduct is not new to Mahnken in the Suffolk Superior Court he informed Davis' employers that he had a court order to obtain all documents in Davis' file. He had no court order. He obtained all privileged documents and information including names of beneficiaries and their addresses.

In Suffolk Court he files "Request for Production of Documents Pursuant to Mass. R. Civ. P. 34 to the Plaintiff in this document he request the following: "4. All records of earnings and income of the plaintiff, including federal income tax returns: a. for a period of three (3) years before and up to the time of the occurrence of the accident alleged in the plaintiff's Complaint:" (Plaintiff's Exhibit "V" page 62).

Therefore, the tax returns would be for the years 1984, 1985, 1986, 1987. Since the accident happened in February 11, 1987.

Mahnken engaged in conduct that is prejudicial to the administration of justice. His misconduct is in violation of the Canon Rules.

Mahnken personally wrote to Judge Craftsley prejudicing him to sign a court order for production of Tax Returns for the years 1984, 1985, 1986, 1987 1988 and 1989. (Plaintiff's Exhibit "W" page 64). Although Judge Craftsley did not sign the exact court order he allowed the tax returns for the years as set forth in the order furnished to him by Mahnken.

The facts indicate that Mahnken used these documents for his own personal gains, resulting in Davis having a Tax Audit.

Therefore, based on the foregoing facts and evidence Mahnken is still continuing to act in bad faith misrepresenting the facts in order to bias and prejudice the court.

J. DAVIS' REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9C Davis request oral argument. Pursuant to Rule 9A Plaintiff's Opposition to Defendant's Motion For Summary Judge [sic] and Memorandum in Support of Plaintiff's Opposition to Defendants' Motion For Summary Judgment will first go to the defendants attorney before it is entered into the court.

Due to the past and present experiences of misconduct on the part of the defendants Davis would not put it past them to distort or do other acts to destroy the contents of this document.

In addition Davis would be able to better express himself to the court orally.

Therefore, based on the foregoing facts Davis requests oral argument.

K. DAVIS REQUESTS COSTS

Pursuant to G.L. c231 § 6F (1990 ed) the defendants motion was frivolous and not advanced in good faith, therefore Davis requests the court to grant him costs.

III. SUMMARY

Davis has substantiated and proved by facts and evidence that defendants knowingly and wilfully breached the contract and did not fulfill its obligation to Davis.

The defendants used fraud unfair and deceptive business practices to swindle and cheat Davis out of monies.

(1) Contract with the defendants was specific, definite, clearly understandable and contained no complex language. (Plaintiff's Exhibit "A" page 34).

(2) Contract was signed by Davis and witnessed by attorney Robert T. Abrams.

(3) Defendants accepted this contract dated September 20, 1991, however, they did not fulfill its obligation and pay Davis. The defendants never returned the contract to Davis. The contract has been in their possession from September 20, 1991, up to and including the present. General Laws c. 176D § 3(9)(f) inserted by St. 1972, c.543 § 1), provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become resonably [sic] clear". General Laws c.93A § 2(a) inserted by St. 1967, c 813 § 1), covers such insurance practices in its prohibition of "Unfair or deceptive acts or practices in the conduct of any trade or commerce" *DODD V. COMMERCIAL UNION INSURANCE COMPANY* 373 Mass. at 78, and provides for recovery of up to three but not less than two times actual damages. . . . "

(4) Defendants knowingly and wilfully used fraud, unfair and deceptive business practices and did not conform with the terms and conditions as set forth in the contract.

(5) October 16, 1991, attorney Abrams wrote to the defendants which states in pertinent part: ". . . . I am returning the $20,000, settlement draft to you. Will you kindly issue a replacement draft made payable to Fred Davis and his attorney, Robert T. Abrams, as specified in the enclosed release dated September 20, 1991. (Plaintiff Exhibit "Q" page 55).

(6) January 29, 1992, Davis wrote to the defendants demanding that draft be made payable to Fred Davis and his attorney Robert T. Abrams. (Plaintiff's Exhibit "T" page 58).

(7) February 21, 1992, Davis wrote to the defendants which states in pertinent part: ". . . . continuation of the on going conspiracy, fraud, wilfull deceptive business practices and using the United States mail to commit fraud. I am again requesting you for the *SECOND TIME* to issue a draft payable to Fred Davis and his attorney Robert T. Abrams as stated in the release that I signed in the amount of $20,000.00 plus interest, since you have withheld this money from me for several months" (Plaintiff's Exhibit "U" page 60). The terms and conditions of the release was draft was to be paid in 30 days (Plaintiff's Exhibit "A" page 34).

(8) Defendants are using Contract to continue with actual intent to mislead, deceive and fraud this court. Defendants are misrepresenting the facts to the court by stating that personal injury litiagation [sic] was

terminated by means of an agreement to release the liability of the defendant in exchange of $20,000.00 to Fred Davis. (Plaintiff's Exhibit "C" page 37) this statement is false. Davis has not received one penny from the defendants although they are holding this contract since September 20, 1991 and the conditions and terms of the contract was that a draft would be payable to Fred Davis and his attorney Robert T. Abrams and the settlement draft is to be paid within 30 days. (Plaintiff's Exhibit "A" page 34). The defendants are misrepresenting the facts with the actual intent to act in bad faith, mislead, deceive and fraud the court, "an act done with actual intent to mislead or deceive another is an act in bad faith" *GROH V. VIGLET* 34 Ohio Law R 132, "Bad faith and fraud are synonymous" *HILGENBERG V. NORTHRUP* 33 N.E. 786, 787, 134 In 92. If, Davis received $20,000.00 he would not have been compelled to take this action.

(9) *There is no lien in this action.* M.G.L. Chapter 221 § 50 ". . . . Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine the enforce the lien. . . . " There is no lien in the courts and the defendants agreed that no request of liens were made to the court.

Moreover, prior to signing of the contract nothing was said by the defendants of a lien.

Defendants accepted the release, however, knowingly and wilfully breached the contract, by not fulfilling its obligation to Davis.

(10) Defendants submit to the court documents which appear to be fraudulent. (Plaintiff's Exhibit "C" page 39 and Plaintiff's Exhibit "E" page 42).

"However, acknowledging receipt of a notice of lien is not tantamount to accepting the validity of the lien" *LIBERTY MUTUAL INSURANCE COMPANY VS. MARCEL J. MURAD* 1992 Mass. App. Div. 163.

(11) Here again, the defendants knowing are misrepresenting the facts to the court. Ravech was not Davis' first attorney and defendants are fully aware of this fact including their attorney Mahnken.

January 22, 1990, Ronald Gluck file Complaint. (Plaintiff's Exhibits "G and "H" pages 44 and 46).

January 23, 1990, tracking order from Barbara J. Rouse sent to Ronald E. Gluck (Plaintiff's Exhibit "I" page 47).

Defendants attorney Mahnken corresponded with with [sic] Ronald Gluck.

April 25, 1990, Mahnken sent letter to the clerk of Courts; copy was sent to Gluck (Plaintiff's Exhibit "L" page 50).

April 25, 1990, letter sent to Ronald E. Gluck Esq. stating ". . . . I have agreed to accept service process. . . . " (Plaintiff's Exhibit "M" page 51).

May 1, 1990, Mahnken letter to the clerk of the Courts copy to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "N" page 52).

May 15, 1990, letter sent by Mahnken to the Clerk of the courts copy to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "O" page 53).

July 9, 1990, letter sent by Mahnken to the Clerk of the courts copy sent to Ronald E. Gluck, Esq. (Plaintiff's Exhibit "P" page 54).

Defendants and their attorney was fully aware that Stuart Ravech was not Davis' first attorney.

(12) Defendants are using a cover-up by stating that attorney said that they could put Ravech's name on the settlement draft.

Thursday August 26, 1993, at 11:38 A.M., Davis telephone attorney Abrams and Abrams informed him – that he did not authorize Ravech's name on the draft. Moreover, Davis never authorzied [sic] any changes in the release.

In fact, Abrams is the one that returned the first check to Hanover Insurance Company because it did not meet with the terms and conditions of the release.

October 16, 1991, attorney Abrams returned the draft to Hanover Insurance Company because it did not comply with the terms and conditions of the release. Context of letter in pertinent part: ". . . . I am returning the $20,000. settlement draft to you. Will you kindly issue a replacement draft made payable to Fred Davis and his attorney, Robert T. Abrams, as specified in the enclosed release dated September 20, 1991" (Plaintiff's "Q" page 55).

(13) Defendants knowingly and wilfully used fraud, unfair and deceptive business practices, therefore, Davis entitled to double or triple damages.

September 20, 1991, Davis in good faith entered into a contract with the defendants.

Defendants acting in bad faith accepted the contract and since September 20, 1991, up to the present have this contract in their possession and have not fulfilled their obligation to Davis.

Defendants used the *bait and switch* deal on Davis cheating and swindling him out of monies.

BAIT: First you sign the contract then you will receive a settlement check of $20,000.00 payable to Fred Davis and Attorney Robert T. Abrams. The draft is to be paid within 30 days. The contract is signed on September 20, 1991 you do not receive a draft in compliance with the terms and conditions. Defendants breach contract. Defendants hold the contract use it against you and you don't get a penny.

SWITCH: Ravech's name appears on the check, therefore, Davis cannot cash it.

There's a lien, however, there is no lien in this action. If, there was a legal lien why wasn't Davis told of this before signing the contract? Fraudulent appearing documents are entered into the court. Inform Davis that they will issue a check to him for $13,500.00. Defendants misrepresent the facts to the court, and hold the release signed by Davis which has been in their possession for about two years now.

General Law c 176D § 3(9)(f) inserted by St. 1972, c. 543 § 1). provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become resonable [sic] clear". General Laws c. 93A § (1), covers such insurance practices in its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". *DODD V. COMMERCIAL UNION INSURANCE COMPANY* 373 Mass. at 78, "and provides for recovery of up to three but not less than two times actual damages. . . . "

Therefore, Davis is entitled to double or triple damages.

(14) Davis was a victim of fraud, unfair, deceptive business practices and swindled and cheat out of monies by the defendant.

Therefore, the issue becomes if Davis is a victim of fraud, unfair and deceptive business practices and swindled out of monies by the defendants, the public interest is also in jeopardy and must be protected from these acts of the defendants.

(15) There are genuine and material issues involved in this action.

There is an issue of tarnished credibility of the defendants, knowingly and wilfully misrepresented the facts of the case to the court. Defendants submitted to the court documents that appear to be fraudulent.

Based on conflicting facts and evidence submitted to the court by Davis, there are a genuine and material

issues and sufficient evidence to require a jury to resolve the parties' versions of the truth at time of trial.

The evidence must be examined in the light most favorable to the plaintiff *LECLAIR V. SILBERLINE MFG.* 379 Mass. 21 at 23 (1979).

(16) Attorney Mahnken, knowing and wilfully violated the Canon Rules and acting in Bad faith in the same manner as he did in the Suffolk Superior Court.

He knowingly and wilfully engaged in conduct involving dishonesty, fraud, deceit and misrepresentation.

Mahnken's misconduct is not new in the Suffolk Superior Court he informed Davis' employers that he had a court order to obtain all documents in Davis' file. He had no court order. However, he obtained all privileged documents and information including names of beneficiaries and their addresses.

In Suffolk Superior Court he filed "Request for production of Documents to the Plaintiff. In this document he requests the following: "4. All records of earnings and income of the plaintiff, including federal income tax returns: a. for a period of three (3) years before and up to the occurrence of the accident alleged in the plaintiff's Complaint; (Plaintiff's Exhibit "V" page 62)

Therefore, the tax returns would be for the years 1984, 1985, 1986, 1987.

Mahnken engaged in conduct that is prejudicial to the administration of justice. His misconduct is in violation of the Canon Rules.

Mahnken personally wrote to Judge Craftsley prejudicing him to sign a court order for production of Tax Returns for the years 1984, 1985, 1986, 1987, 1988 and 1989, (Palintiff's [sic] Exhibit "W" page 64). Although Judge Craftsley did not sign the exact order that was issued to him, he allowed the tax returns for the years as set forth in the order furnished by Mahnken.

(17) Pursuant to Rule 9C Davis requests oral argument.

Pursuant to Rule 9A Plaintiff's Opposition To Defendant's Motion will first go to the defendants attorney before it is entered into the court.

Due to the past and present experiences of misconduct on the part of the defendants Davis would not put it past them to distort or do other acts to destroy the contents of this document.

In addition Davis would be able to better express himself to the court orally.

(18) Purusant [sic] to G.L. c231 § 6F (1990 ed) the defendants motion was frivolous and not advanced in good faith, therefore, Davis requests the court to grant him costs.

Therefore, based on the foregoing facts and evidence the plaintiff moves the court to deny the defendants motion and requests the court to grant him costs.

Respectfully submitted

Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma. 02148
(617) 322-8578

Date: ___

AFFIDAVIT OF FRED DAVIS

I, Fred Davis, being first duly sworn and say:

1. I am the plaintiff in the action *Fred Davis v. Hanover Insurance Company, et al.* Norfolk Superior Court No. 93-00574

2. All attached documents: Plaintiff's Exhibits "A" through "W" are true copies.

/s/ Fred Davis
Fred Davis

Dated:

On this 8 day of September, Fred Davis personally appeared before me and being by me first duly sworn, did make oath and say that the matter set forth in the foregoing affidavit is true.

/s/ Christine Hastone
NOTARY PUBLIC

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,
Plaintiff

vs.

HANOVER INSURANCE COMPANY,
Defendant

MOTION OF DEFENDANT, HANOVER INSURANCE COMPANY FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

Now comes the defendant, Hanover Insurance Company and and [sic] moves this Honorable court pursuant to Mass.

R. Civ. P. Rule 56 (b) to enter summary judgment in favor of the Counts I-IV of plaintiff's Complaint as a matter of law.

An Affidavit, Memorandum of Law and exhibits are attached hereto.

Defendant
By its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE
& STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

Dated: 8/25/93

1/14/94 – After hearing and upon considering all submissions, and the entire file, Motion of Defendant, Hanover Insurance Company for Summary Judgment is ALLOWED in its totality. See: Defendant's memorandum attached hereto.

Thomas E. Connolly, JSC

Dated: 8/25/93

NORFOLK COUNTY
SUPERIOR COURT
CIVIL DOCKET
LAW AND EQUITY

Docket No. 93-574

Fred Davis *vs.* Hanover Insurance Company

Ad Damnum $ ___ Date of Writ ___

DOCKET ENTRIES

Counsel for Plaintiff	Counsel for Defendant
Fred Davis (Pro Se) 353 Bryant St. Malden, MA 02148 617 322-8578	Mark F. Mahnken, Esq. Driscoll, Gillespie & Stanton 200 Broadway – P. O. Box 850 Lynnfield, MA 01940 617 596-2200 George R. Suslak, Esq. John J. Lang, Esq. Stanton & Lang 200 Broadway – P. O. Box 1080 Lynnfield, MA 01940 617 595-1440

1.	1993 March 10	Complaint and Jury Claim
2.	1993 March 10	Cover Sheet
	1993 March 10	Fast Track Notice sent to Plaintiff
3.	1993 March 16	Return of Service Re: Hanover Insurance Co. – In Hand to Deanna Chace, Clerk

4.	1993 April 1	Deft's Answer, Counterclaim and Jury Claim
5.	1993 April 5	Plff's Answer to Deft's Counterclaim
6a.	1993 April 21	Plff's Motion to Strike Deft's Answer to Plff's Complaint – date Received April 15, 1993
6b.	1993 April 21	Deft's Opposition to Plff's Motion to Strike Deft's Answer – date Received April 15, 1993
6c.	1993 April 21	Deft's Memorandum in Support of Opposition to Plff's Motion to Strike Deft's Answer
	1993 April 26	Re: Plff's Motion to Strike Deft's Answer to Plff's Complaint (p. #6a) Denied (Brady, J.) dated April 22, 1993 c.s. April 26, 1993
7a.	1993 August 30	Plff's Motion Compelling Production of All Documents
7b.	1993 August 30	Deft's Opposition to Plff. Fred Davis' Motion to Compel Production of Documents
7c.	1993 August 30	Plff's Affidavit of Compliance with Superior Court Rule 9A
	1993 Sept. 8	Re: Plff's Motion Compelling Production of All Documents (p. #7a) Denied without Prejudice – No Rule 9C Certificate (Hely, J.) dated Sept. 1, 1993 c.s.
8a.	1993 Sept. 24	Deft's Motion for Summary Judgment Under M.R.C.P. 56

8b.	1993 Sept. 24	Deft's Memorandum of Law in Support of Its Motion for Summary Judgment Under M.R.C.P. 56
8c.	1993 Sept. 24	Plff's Opposition to Deft's Motion for Summary Judgment and Memorandum in Support of Plff's Opposition to Deft's Motion for Summary Judgment
8d.	1993 Sept. 24	Plff's Memorandum in Support of Opposition to Deft's Motion for Summary Judgment
8e.	1993 Sept. 24	Deft's Document List
9a.	1993 Oct. 5	Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37
9b.	1993 Oct. 5	Plff's Opposition to Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37
	1993 Oct. 12	Re: Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37 (p. 9a) Motion Allowed. Thirty Days to Produce (Stearns, J.) n.a.
10.	1993 Oct. 12	Plff's Motion for Enlargement of Time for Production of Documents
	1993 Oct. 12	Re: Plff's Motion for Enlargement of Time for Production of Documents (p. #10) Motion Denied (Stearns, J.) n.s.
11a.	1993 Nov. 2	Plff's Motion for Sanctions Against Attorney Mark F. Mahnken

11b.	1993 Nov. 2	Opposition to Plff's Motion for Sanctions Against Attorney Mark F. Mahnken
11c.	1993 Nov. 2	Plff's Opposition to Opposition of Deft. to Plff's Motion for Sanctions Against Attorney Mark F. Mahnken
11d.	1993 Nov. 2	Plff's Affidavit of Compliance with Superior Court Rule 9A
11e.	1993 Nov. 2	Plff's Affidavit of Compliance with Superior Court Rule 9A – Re: Rule 9C
11f.	1993 Nov. 2	Plff's Opposition to Deft's Opposition to Plff's Request for Leave of Court from Compliance with Rule 9C
11f.	1993 Nov. 2	Plff's Request Leave of Court from Complying with Rule 9C and Memorandum in Support of Request Leave of Court from Complying with Rule 9C
11h.	1993 Nov. 2	Deft's Opposition to Plff's Request for Leave of Court from Compliance with Rule 9C
	1993 Nov. 5	Re: Plff's Motion for Sanctions Against Attorney Mark F. Mahnken (p. #11a) Motion Denied (Stearns, J.) dated Nov. 3, 1993 c.s.
12a.	1993 Nov. 12	Plff's Motion for Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition and Memorandum

		in Support of Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition
12b.	1993 Nov. 12	Plff's Affidavit of Compliance with Superior Court Rule 9A
12c.	1993 Nov. 12	Plff's Opposition to Opposition of Hanover Ins. Co. to Plff's Motion for Protective Order Regarding Deposition of Robert T. Abrams
12d.	1993 Nov. 12	Deft's Opposition to Plff's Motion for Protective Order Regarding Deposition of Robert T. Abrams
13a.	1993 Nov. 26	Plff's Motion for Change of Venue – date Received Nov. 22, 1993
13b.	1993 Nov. 26	Deft's Opposition to Plff's Motion for Change in Venue – date Received Nov. 22, 1993
13c.	1993 Nov. 26	Plff's Opposition to Deft's Opposition to Plff's Motion for Change in Venue – date Received Nov. 22, 1993
13d.	1993 Nov. 26	Plff's Affidavit of Compliance with Superior Court Rule 9A – date Received Nov. 22, 1993
	1993 Dec. 9	Re: Plff's Motion for Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition (p. #12a) Motion Denied (Stearns, J.) dated Nov. 16, 1993 c.s.

14a.	1993 Dec. 15	Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum
14b.	1993 Dec. 15	Plff's Opposition to Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum
14c.	1993 Dec. 15	Deft's Certificate Pursuant to Superior Court Rule 9C
14d.	1993 Dec. 15	Deft's Certificate of Service
	1993 Dec. 22	Re: Plff's Motion for Change in Venue (p. #13a) Motion Denied (Stearns, J.) dated Dec. 17, 1993 c.s.
15.	1993 Dec. 29	Rule 9A Scheduling Order Re: Deft's Motion for Summary Judgment with Opposition Scheduled for Friday, January 14, 1994 at 9:30 a.m. before Judge DelVecchio in Court Room 3 c.s.
	1993 Dec. 30	Re: Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum (p. #14a) Motion ALLOWED (Chernoff, J.) dated Dec. 29, 1993 c.s.
	1994 Jan. 18	Re: Deft's Motion for Summary Judgment Under M.R.C.P. 56 (p. #8a) – After hearing, and upon considering all submissions, and the entire file, Motion of Deft. Hanover Insurance Company

		for Summary Judgment is ALLOWED in its totality. See: Defendant's Memorandum-attached exhibits. (Connolly, J.) dated Jan. 14, 1994 n.s.
16.	1994 Jan. 21	Plff's Notice of Appeal
17a.	1994 Jan. 27	Plff's Motion for Costs Against the Defendant
17b.	1994 Jan. 27	Deft's Opposition to Plff's Motion for Costs
17c.	1994 Jan. 27	Plff's Affidavit of Compliance with Superior Court Rule 9A
	1994 Feb. 4	Re: Plff's Motion for Costs Against the Defendant (p. #17a) Motion DENIED (Connolly, J.) dated Feb. 3, 1994 c.s.
18.	1994 Aug. 12	Plff's Third Motion for Immediate Assembly of the Record and Memorandum in Support of Third Motion for Immediate Assembly of the Record – date Received Aug. 10, 1994
	1994 Sept. 16	Re: Plff's Third Motion for Immediate Assembly of the Record (p. #18) – Motion DENIED (White, J.) dated Sept. 14, 1994 c.s.
19.	1995 July 19	Plff's Fifth (fourth) Notice of Immediate Assemble [sic] of the Record
20.	1995 Aug. 14	Plff's Sixth Notice of Assembly of Record and Courts Letter to Mr. Davis

	1995 Aug. 24	Notice sent to all Parties for a Status Conference on Monday, September 11, 1995 at 2:30 p.m. before Judge Dortch-Okara c.s. – Failure to appear with result in Automatic Default or Dismissal (Dortch-Okara, J.)
21.	1995 Sept. 12	Deft's Motion for Voluntary Dismiss Re: Motion Allowed (Dortch-Okara, J.) dated Sept. 11, 1995 n.s.
22.	1995 Sept. 12	Judgment (Summary) Re: Count I of Case in Chief (Connolly, J.) c.s.
23.	1995 Sept. 12	Judgment (Summary) Re: Count II of Case in Chief (Connolly, J.) c.s.
24.	1995 Sept. 12	Judgment (Summary) Re: Count III of Case in Chief (Connolly, J.) c.s.
25.	1995 Sept. 12	Judgment (Summary) Re: Count IV of Case in Chief (Connolly, J.) c.s.
26.	1995 Sept. 12	Judgment Re: Counterclaim on Deft's Motion for Voluntary Dismissal of Its Counterclaim (Dortch-Okara, J.) c.s.
27.	1995 Oct. 3	Plff's Notice of Appeal Re: Decision of Judge Connolly (Judgment)
28.	1995 Oct. 5	Notice of Service of Notice of Appeal Re: The Honorable Thomas E. Connolly, Associate

	Justice of the Superior Court, Suffolk Superior Court, Court Room 906, New Court House, Boston, MA 02108-1701; George R. Suslak, Esq., John J. Lang, Esq., Suslak, Stanton & Lang, 200 Broadway, Box 1080, Lynnfield, MA 01940
1995 Oct. 18	Plaintiff Fred Davis informs Court by *telephone only* that he is not including a transcript to be included in the record for the Appeal

A True Copy:

Attest: _____
Assistant Clerk

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

pending in the Superior Court for the County of Norfolk

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Nancy Turck Foley
Clerk.

Date June 14, 1996

NOTE:

The original of the
within rescript will
issue in due course, pursuant
to M.R.A.P. 23

APPEALS COURT

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617)-557-1020

George R. Suslak, Esquire
Driscoll, Gillespie & Stanton
200 Broadway
PO Box 850
Lynnfield, MA 01940

RE: Docket No. FAR-08597

FRED DAVIS
VS.
HANOVER INSURANCE COMPANY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 24, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: July 24, 1996

To: Fred Davis
George R. Suslak, Esquire

§ 30. Larceny; general provisions and penalties

[See main volume for (1)]

(2) The term "property", as used in the section, shall include money, personal chattels, a bank note, bond, promissory note, bill of exchange or other bill, order of certificate, a book of accounts for or concerning money or goods due or to become due or to be delivered, a deed or writing containing a conveyance of land, any valuable contract in force, a receipt, release or defeasance, a writ, process, certificate of title or duplicate certificate issued under chapter one hundred and eighty-five, a public record, anything which is of the realty or is annexed thereto, a security deposit received pursuant to section fifteen B of chapter one hundred and eighty-six, electronically processed or stored data, either tangible or intangible, data while in transit, telecommunications services, and any domesticated animal, including dogs, or a beast or bird which is ordinarily kept in confinement.

[See main volume for (3) and (4)]

(5) Whoever steals or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another, sixty years of age or older, or of a person with a disability as defined in section thirteen K of chapter two hundred and sixty-five, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property exceeds two hundred and fifty dollars, be punished by imprisonment in the state prison for not more than ten years or in

the house of correction for not more than two and one-half years, or by a fine of not more than fifty thousand dollars or by both such fine and imprisonment; or if the value of the property does not exceed two hundred and fifty dollars, shall be punished by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars or by both such fine and imprisonment. The court may order, regardless of the value of the property, restitution to be paid to the victim commensurate with the value of the property.

Amended by St.1995, c. 272, § 3; St.1995, c. 297 § 9.

Supreme Court, U.S.
FILED
DEC 3 1996
CLERK

(3)

No. 96-640

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

v.

HANOVER INSURANCE COMPANY, et al.,

Respondent.

Petition For Writ Of Certiorari
To The Massachusetts Supreme Court

PETITIONER'S REPLY BRIEF

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11pp

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Respondents argument lacks any weight since they are misrepresenting the facts and their appendix contains a fraudulent document (respondents' 21a) which they state was signed by Stuart Ravech this is not true. The original document that was submitted to the Dedham Superior Court does not bear the signature of Stuart Ravech, moreover, this document did not surface into being until the petitioner signed the release.

Respondents' document 23a, letter addressed to attorney Abrams has not appeared in any prior pleadings, it is my understanding that this letter was not mailed to Mr. Abrams as there was an agreement between Mr. Abrams and the petitioner that all copies of correspondence, etc., pertaining to this action would be forwarded to the petitioner. The petitioner did not receive a copy of this document.

The respondents are continuing to act in bad faith with the actual intent to deceive and fraud the court in the same manner as they have done in the lower courts. "An act done with actual intent to mislead or deceive another is an act in bad faith" Groh v. Viglet 34 Ohio Law R 132. "Bad faith and fraud are synonymous" Hilgenberg v. Northrup 33 N.E. 786, 787, 134 92.

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION OF BREACH OF CONTRACT

The respondents concede that they formulated and accepted the contract that was signed by the petitioner on September 20, 1991, and since that date up to the present time they have this document in their possession and they have not paid the petitioner.

The respondents concede that United States v. Windstar 64 United States Law Weekly page 4739 is an issue in this action.

II. PETITION SHOULD BE GRANTED BECAUSE THE RESPONDENTS VIOLATED THE MASSACHUSETTS CRIMES AGAINST THE ELDERLY AND DISABLED

Respondents argue that crimes against the elderly and disabled did not become law until December 18, 1995, however, to substantiate their argument they submit to the court documents 82a and 83a. However, this is not the original law, but merely the amended law in 1995.

The respondents are misrepresenting the facts to this court, as the Massachusetts Law of Crimes Against The Elderly and Disabled was argued by the petitioner orally in the lower courts.

III. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS

The respondents argue the petitioner's Constitutional Rights were not deprived because this issue does not appear in documents they submitted in their appendix.

Respondents are misrepresenting the facts to this court.

Petitioner argued orally in the lower courts that his Constitutional Rights to due process of law and equal protection of the law was being deprived when the lower courts failed to take any action against the respondents for committing a crime against an elderly and disabled person.

IV. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED AS THE RESPONDENTS OPPOSITION IS DONE IN BAD FAITH

Massachusetts General Laws Chapter 221 § 50 states in pertinent part: "...upon request of the client or of the attorney, the court in which the proceeding is pending or, if not pending in a court, the superior court, may determine and enforce the lien..." The respondents concede to the fact that there is no lien in the courts and no request of lien was made to the court.

Respondents state "On April 26, 1991, the respondents's attorney was served a lien".

Why wasn't a lien sent to the petitioner? Why wasn't a lien sent to the petitioner's attorney which he engaged on May 9, 1991, and is attached Appendix A? Why did a lien come in to focus after the petitioner signed the release and it was in the respondents' possession?

There is no lien the respondents made up a lien in order to use it as a pretext to steal monies from the petitioner who is elderly and disabled.

The respondents have committed a severe crime against an elderly and disabled person by means of fraud, unfair and deceptive business practices, entrapment and Massachusetts Crimes Against the Elderly and Disabled.

For purposes for arguing: "However, acknowledging receipt of a notice of lien is not tantamount to accepting the validity of the lien" Liberty Mutual Insurance Company v. Marcel J. Murad 1992 Mass. App. Div 163 attorney was not paid for lien mailed to Liberty Mutual Insurance Company.

V. THE PUBLIC INTEREST IS INVOLVED

There are questions to be resolved by this Honorable Court.

Are all contracts/releases signed by the public with special emphasis on the elderly and disabled not be paid for their injuries, etc.,? Are all contracts/releases going to be meaningless and can not be enforceable in the Court?

The answers to these questions are vital to the public interest.

CONCLUSION

For the foregoing reasons and the facts set forth in petitioner's Petition For Writ of Certiorari the petitioner Fred Davis respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully Submitted,

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May 9, 1991

Fred Davis
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Pay to the order of Robert T. Abrams $1,000.00

One thousand----------dollars no/100

SHAWMUT
Shawmut Bank N.A.
Boston, Ma 02211

s/Fred Davis